(25,044)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 761.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

SARAH WHITE.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

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a W. L. V.

In the Court of Appeals, State of New York.

State Workmen's Compensation Commission.

In the Matter of the Claim of SARAH WHITE for Compensation Arising Out of the Death of Jacob White, Claimant-Respondent,
against
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Employer-Appellant.

Papers on Appeal.

Visscher, Whalen & Austin, Attorneys for Employer-Appellant, Office and Post Office Address, 19 Tweddle Building, Albany, N. Y.
Hon. Egburt E. Woodbury, Attorney General, Office and Post Office Address, The Capitol, Albany, N. Y.
Hon. Jeremiah F. Connor, Counsel for State Workmen's Compensation Commission, 1 Madison Avenue, New York City.
Sarah White, Claimant, 42 Caroline Avenue, Yonkers, N. Y.

1 In the Court of Appeals, State of New York.

State Workmen's Compensation Commission.

In the Matter of the Claim of SARAH WHITE for Compensation, Arising Out of the Death of Jacob White,
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer.

Statement.

The above proceeding is a claim for compensation under the Workmen's Compensation Law. Claim was filed with the State Workmen's Compensation Commission, on the form provided by the Commission, September 28th, 1914.

Notice of death was given to employer October 2nd, 1914.

Hearing was had before the State Compensation Commission October 20th, 1914.

A decision was reached by a resolution of the State Workmen's Compensation Commission awarding compensation to the claimant at the rate of three dollars and three one-hundredths ($3.03) per week, during the widowhood of claimant together with the sum of One hundred dollars ($100) funeral expenses paid by her.

The Employer filed with the State Workmen's Compensation Commission proposed Findings of Fact, and Conclusions of Law November 13, 1914.

Findings of Fact and Conclusion of Law were made by the Commission November 21, 1914.

2 A copy of the decision and award of the Commission was sent to the employer company, December 10th, 1914.

The attorneys for the employer company filed with the Commission its exceptions to the decision and award on December 14th, 1914 and filed with the Attorney General of the State its exceptions to the decision and award on December 15th, 1914.

Notice of appeal was served on the State Workmen's Compensation Commission December 14th, 1914.

Notice of appeal was served on the Attorney General of the State of New York December 15th, 1914.

Notice of appeal was served on claimant, Sarah White bv registered mail December 15th, 1914.

The names of the parties are given in full above and there has been no change during the pendency of the claim.

Appearances before the Commission were as follows:

Jeremiah F. Connor, Esq., Counsel for State Workmen's Compensation Commission; W. H. Failing, Esq., and Visscher, Whalen & Austin, Attorneys for the Employer and Self Insurer.

The claimant was not represented before the Commission by counsel and did not appear personally.

Order of Affirmance entered in the office of the Clerk of Appellate Division, Third Department, May 7th, 1915.

Order of Appellate Division made the order of the State Workmen's Compensation Commission May 14th 1915.

Notice of appeal to Court of Appeals served by the Employer upon the Attorney General of the State of New York, State Workmen's Compensation Commission, Jeremiah F. Connor, Counsel to said Commission, and Mrs. Sarah White, Claimant, on May 25th, 1915.

2a *Notice of Appeal to Court of Appeals.*

State Workmen's Compensation Commission.

In the Matter of the Claim of SARAH WHITE for Compensation under the Workmen's Compensation Law, Arising Out of the Death of Jacob White,

against

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer.

SIRS: Take Notice, that the above named employer The New York Central & Hudson River Railroad Company, hereby appeals to the Court of Appeals of the State of New York, from the order of the State Workmen's Compensation Commission, bearing date May 14th, 1915, made and entered upon an order of the Appellate Division of the Supreme Court, Third Judicial Department, at a term of said court, commencing on the 4th day of May, 1915, and entered in the office of the Clerk of said Appellate Division on the 7th day of

May, 1915, affirming the decision and award of the State Workmen's Compensation Commission entered in the office of the said Commission on the 20th day of October, 1914, which order of
2*b* the Appellate Division will also be brought up for review upon said appeal.

Dated, Albany, N. Y. May 22nd, 1915.

Yours, etc.,

VISSCHER, WHALEN & AUSTIN,
Attorneys for Employer.

Office and Post Office Address, 19 Tweddle Building, Albany, N. Y.

To Attorney-General of the State of New York, State Workmen's Compensation Commission, Jeremiah F. Connor, Esq., Counsel to said Commission, and Mrs. Sarah White, Claimant.

3 *Notice of Death to Commission.*

Form C-73.

State Workmen's Compensation Commission.
New York Office: 1 Madison Avenue.

Notice of Death to Commission (by Dependents or on Their Behalf).

Bureau of Claims.

Claim No. 31018.

Case of Jacob White.

Instructions.

In case of death fill this out and mail at once to the Commission.

State Workmen's Compensation Commission,
1 Madison Avenue, New York, N. Y.

Jacob White injured on the 2nd day of September, 1914, while in the employ of N. Y. C. & H. R. R. R. died as a result of said injuries on the 2nd day of September,1914, at White Plains R. R. Station, White Plains.

Street and Number —.

City or Town: Westchester County, New York.

Has notice been served on employer? Yes. If so, how? (by delivery or registered mail). By telephone. What date? Sept. 2nd.

Sign here, SARRAH WHITE, *Wife.*

Dated at Yonkers, N. Y., this 26th day of Sept. 1914.

Relationship to deceased —.

42 Caroline Ave., Address.

4 *Notice of Death to Employer by Defendant.*

Form C-72.

State Workmen's Compensation Commission.
Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Notice of Death to Employer (by Dependents or on Their Behalf).

Claim No. 31018.

Case of Jacob White.

INSTRUCTIONS.—In case of death fill this out and deliver or send by registered mail to the Employer within 30 days after death.

Mr. J. A. Lally, Employer, N. Y. C. & H. R. R., Yonkers, N. Y.:

Jacob White was injured on the Sept. day of 2nd, 1914, while in your employ, died as a result of said injuries on the Sept. day of 2nd, 1914, at white Plains.

Street and number, —.

City or town, Weschester County.

Sign here, SARAH WHITE, *Wife.*

Relationship to deceased, —.

42 Caroline Ave., Address.

Dated at Yonkers, N. Y., this 26th day of Sept. 1914.

5 *Notice of Death to Employer by Commission.*

Form C 12.

State Workmen's Compensation Commission.
Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Notice of Death to Employer.

Claim No. 31018.

Case of Jacob White.

N. Y. C. & H. R. R. R. Co., Grand Central Terminal.

DEAR SIR: Notice of death of Jacob White at White Plains, has been filed with the Commission.

Death occurred on Sept. 2, 1914, by reason of injury sustained by him on Sept. 2, 1914, while in your employ.

Please execute and return promptly to the Commission the enclosed Form C-19, Proof of Death (Affidavit of Employer).

STATE WORKMEN'S COMPENSATION COMMISSION.

Dated Sep. 14, 1914.
1 enclosure.

6 *Claim for Compensation.*

Form C 79.

State Workmen's Compensation Commission.
Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Form of Claim for Compensation by Defendants in Death Case.

Claim No. 31018.

Case of Jacob White.

To the State Workmen's Compensation Commission, No. 1 Madison Avenue, New York City:

—— ——, I hereby make claim for compensation under Section 16 of Chapter 67 of the Consolidated Laws. My claim arises out of the death of my husband who died on Sept. day of 2nd 1914, as a result of injury sustained on R. R. N. Y. C. day of Sept. 2nd 1914, in the employ of J. A. Lally of 381 S. B'way, Yonkers.

I was wife of the deceased Jacob White and I was dependent upon the deceased for support at the time of his death.

I have the following children:

Names, Grace Brusie.

Date of Birth, Oct. 16, 1877.

Who were also dependent upon said deceased for support.

I was born on August 9, 1853.

I was married to the deceased on Aug. day of 7th 1875 at Gallatin. I reside at present at No. 42 Caroline Ave. in the City and Town of Yonkers, County of Westchester, State of N. Y.

(Signed) SARAH WHITE.

Dated this 26th day of Sept. 1914.

7 *Affidavit.*

STATE OF NEW YORK,
County of Westchester, ss:

On this 26th day of September, A. D., 1914, personally appeared before me the above named Sarah White, and made oath that the answers by —— —— above named — and subscribed are true.

[NOTARY'S SEAL.] JOHN S. WATT,
Notary Public.

Address, 78 North Broadway, Yonkers, N. Y.

Employer's First Report of Injury.

Form C-2.

State Workmen's Compensation Commission.
Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Employer's First Report of Injury.

Claim No. 31018.

Case of —— ——.

Employer's name: N. Y. C. & H. R. R. R.
Office address: Grand Central Terminal, New York City, N. Y.
(Street and number, city or village and county:) —.
Business, goods produced, work done or kind of trade or transportation: R. R.
Location of plant or place of work where accident occurred: Railroad.
(Street and number:) —.
In what city or village? White Plains. County? Westchester.

8 Date of accident: 2nd day of September, 1914; hour of day: 7:08 P. M. (A. M. P. M.).
Did accident happen on the premises? Yes. At the plant? Yes.
Away from the plant of employer? —.
If away from the plant, state where: —.
Was employee injured in course of employment? Yes.
Give full name of injured employee: Jacob White.
Address: 42 Caroline Avenue, Yonkers, N. Y.
(Street and number, city or village and county:) —.
Sex: Male. Age: 67. Speak English? Yes. If not, what language? —.
Occupation when injured? Night Watchman.

Was injured employee doing his regular work? Yes. If not, what work? —.

How long was injured person in your employment? Since May 1st, 1909.

Piece or time worker? Time. Wages or average earnings per day? 1.75.

Describe in full how the accident occurred: Was struck by train No. 464 while walking close to track.

State nature and extent of injury: (Killed instantly.)

(If amputation was necessary, state what part amputated:)

Was medical attendance provided by you?.....

How soon after accident?.....

Name and address of physician.....

To what hospital was employee sent?.....

Address of hospital.....

If not sent to hospital, where is he?.....

9 Are you still providing medical attendance?.....

If injured employee has already returned to work, give date of return..... If so, is he fully recovered and earning full wages?.....

How many working days did he lose on account of accident?

.....

If not returned to work, probable length of disability.....

(Give your best estimate:)

Is injured employee married or single? Married.

Is insurance carried in the State Fund? No. If not, in what company or association? Self Insured.

Signed, this 9 day of September, 1914, at New York City, N. Y.

Firm name: N. Y. C. & H. R. R. R.

Signed H. H. Downs; Official title, Chief Claim Agent.

Affidavit of Death of Eye Witness.

Form C-23.

State Workmen's Compensation Commission.
Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Proof of Death, Affidavit of an Eye Witness.

Claim No. 31018.

Case of Jacob White.

In the matter of the death of Jacob White late of Yonkers, N. Y., who was injured about 7:07 — M. on the 2nd day of September, 1914.

10 What is your full name? Fowler Brevoort. What is your age? 37 years.

What is your occupation? Engineman.

Where do you reside? 70 So. Lexington Ave., White Plains, N. Y.

How long had you known the deceased? Did not know him.

Were you and the deceased close friends? No.

Where was he when he met with the injury? White Plains, N. Y.

What was he doing at the time? Standing between two main tracks to clear when I saw him.

Were any persons other than yourself and deceased present at the time he was injured? If so, give their full names and addresses: None that I know of.

State how alleged injury was received (give full details): Was running train #464 from North White Plains to New York. Saw deceased standing between tracks to clear. After front end passed heard a noise on side of train, stopped and found White had been struck.

What relation are you, if any, to the deceased? No relation.

Dated at New York, N. Y., this 25th day of Sept. 1914.

(Signature) FOWLER BREVOORT.

Witness to signature:
F. W. DUERR.

P. O. Address of witness: 611 W. 177th St., New York City.

11 STATE OF NEW YORK,
County of New York, ss:

On this 25th day of Sept., 1914, personally appeared before the undersigned, a Notary Public in and for the said County and State, the above named Fowler Brevoort to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being fully advised in the premises, subscribed his name hereto in my presence, and made oath that the foregoing statements, and each and all of them are full and true, and are made without reservation or concealment.

[NOTARY'S SEAL.] FRED W. DUERR.

Post Office Address 61 W. 177th St., N. Y. City.

Proof of Death by Employer.

Form C-19.

State Workmen's Compensation Commission.
Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Proof of Death Affidavit of Employer.

Claim No. 31018.
Case of Jacob White.

—— —, 191–.

Name: Jacob White.
Address: 42 Caroline Avenue, Yonkers.

In the matter of the death of Jacob White, late of 42 Caroline Ave. who was injured about — M., on the 2nd day of September, 1914.

12 What is your name in full? N. Y. C. & H. R. R. R. Co.

What is your post office address? Room 2842 Grand Central Terminal, New York.

What is the name of the firm or corporation with which you are connected? N. Y. C. & H. R. R. R. Co.

What is the kind and character of the business conducted? Transportation.

What is your official title? —.

How long had you been personally acquainted with the deceased? — years, — months.

How long was he in your employ? 5 years, 4 months.

In what capacity was he in your employ? Night watchman.

What were his average daily wages? $1.75.

Do you know, as a matter of personal knowledge, that he was accidentally or otherwise injured? No.

What are the full particulars as to how, when and where he was so injured? Standing on baggage crossing just south of White Plains station, looking toward the south; struck by south bound train 464, enroute to New York on southbound track. Stood on ties just east of east rail of track. Had no duty to perform at point where he was injured.

What are the names, ages and residence addresses of his widow and children? Sarah White, 58, widow, #42 Caroline Ave. Yonkers, N. Y. Mrs. F. Bruise, 37, daughter, same address.

On what date did he die? Sept. 2nd, 1914.

13 What are the names and addresses of all the persons who were present at the time of the injury? F. Brevoort, White Plains, N. Y. Fred Weaver, White Plains, N. Y.

Remarks: Deceased was outside the bounds and not in course of his employment when killed.

Dated at New York, N. Y., this 16th day of Sept. 1914.

(Signature)

NEW YORK CENTRAL & HUDSON RIVER R. R. CO.
W. H. FAILING,
Ass't Chief Claim Agent.

Witness to signature:
—— ——.

P. O. address of witness: ——, —.

Notice of Death to Insurance Carrier.

Form C-45.

State Workmen's Compensation Commission.
Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Bureau of Claims.

Notice of Death to Insurance Carrier.

Claim No. 31018.
Case of Jacob White.

N. Y. C. & H. R. R. Co., Grand Central Terminal, New York City.

GENTLEMEN: Notice of death of Jacob White, which occurred at White Plains, N. Y., on Sept. 2nd, 1914, by reason of injury
14 sustained on Sept. 2nd, 1914, while in the employ of N. Y. C. & H. R. R. Co., insured by you, has been filed with the Commission.

The employer has been requested to forward to the Commission, without delay. Employer's Report on Wages of the Deceased, also Proof of Death (Affidavit of Employer).

The dependents of the deceased have also been asked to furnish to the Commission the necessary Proof of Death documents.

STATE WORKMEN'S COMPENSATION COMMISSION.

Dated Sep. 14, 1914.

15 *Notice of Hearing.*

State Workmen's Compensation Commission.
Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.

Notice to Insurance Carrier.

Claim No. 31018.
Claimant Jacob White.

To the Insurance Carrier Addressed:

You are hereby notified that this claim seemingly is complete and that it will be summarized and presented to the Commission Oct. 20, 1914, at its New York Office, (1 Madison Avenue).

The Bureau of Claims will recommend that an award be made of $24.24, being for 8 weeks at $3.03 per week, with additional bi-weekly payments of $6.06 each, and that the case be closed.

STATE WORKMEN'S COMPENSATION COMMISSION.

The case will be considered for final award on Oct. 20, 1914, 10 A. M. at 1 Madison Ave., New York City, N. Y.

If you have information contrary to the foregoing, please communicate the same to the Commission prior to such date.

STATE WORKMEN'S COMPENSATION COMMISSION.

Dated, Oct. 14, 1914.

16 *Minutes.*

Claim No. 31018, Jacob White, was then submitted; employer, New York Central & Hudson River Railroad Company, selfinsurer; represented by W. H. Failing.

Commissioner Mitchell: Are the claimants present (no answer)?

Mr. Connor: Where did the accident happen?

Mr. Failing: At White Plains.

Mr. Connor: Mrs. White lives at Yonkers?

Mr. Failing: Yes, sir.

Commissioner Mitchell: Put your evidence in.

Mr. Failing: I will call Samuel E. Stratton; Mr. Stratton, what is your business?

Mr. Stratton: Foreman of construction.

Mr. Failing: What were the duties of Mr. White?

Mr. Stratton: Watchman.

Mr. Failing: Were you in charge of the construction work up there?

Mr. Stratton: Yes, sir.

Mr. Failing: In the new White Plains station, work in connection with the same?

Mr. Stratton: Yes, sir; I did the filling of the property there.
Mr. Failing: Did the deceased work under your direction?
Mr. Stratton: Yes, sir.
Mr. Failing: Did he report to any other person?
Mr. Stratton: Not at that time.
Mr. Failing: He received all his orders from you?
Mr. Stratton: Yes, sir.
Mr. Failing: He worked nights?
Mr. Stratton: Nights, yes.
Mr. Failing: What do you know about the accident, tell the Commission.
Mr. Stratton: I don't know anything.
Commissioner Mitchell: You don't know anything about it?
17 Mr. Stratton: No, sir.
Mr. Failing: You were not an eye-witness?
Mr. Stratton: I was not an eye-witness.
Mr. Failing: He reported that day, when?
Mr. Stratton: At six thirty.
Commissioner Mosher: Morning or evening?
Mr. Stratton: Evening.
Mr. Failing: Tell us as to the condition at White Plains, and the work of building the new station—it was entirely to the west of the main track?
Mr. Stratton: Yes, sir.
Mr. Failing: Was there any work to the east of the main track?
Mr. Stratton: No, sir.
Mr. Failing: What were the duties of Mr. White?
Mr. Stratton: To patrol in this section, and to keep watch for fires.
Mr. Failing: He was a sort of a watchman at night?
Mr. Stratton: Yes, sir; just a watchman or night patrolman.
Mr. Failing: Did he have any duties on the main tracks or to the east of the track?
Mr. Stratton: No, sir.
Mr. Connor: Do you claim he was not injured out of his employment?
Mr. Failing: Yes, sir.
Mr. Connor: Do you claim that this man is not entitled to compensation for injuries received in the course of the employment?
Mr. Failing: We claim he was not entitled to compensation because he was injured outside of and not arising out of or in the course of the employment; and also for the reason that the railroad is engaged in interstate commerce, and that the Federal Courts would be his exclusive remedy.
Commissioner Wainwright: Would this man have a remedy under the Federal Law?
18 Mr. Failing: That would be his remedy.
Commissioner Darlington: Would he have a remedy?
Mr. Failing: I presume he has.
Commissioner Darling: In other words, that the railroad is liable any way?

Mr. Failing: No, sir; I would not say that; in the Federal Courts, he would have to show negligence in order to recover.

Mr. Connor: You claim he was a trespasser?

Mr. Failing: We claim he was not at the point where he was supposed to work.

Mr. Connor: That would defeat his cause of action under the Federal Law?

Mr. Failing: Yes, sir; under the Federal Law.

Mr. Connor: What was he supposed to watch?

Mr. Stratton: He was supposed to watch the tool cars and lumber.

Mr. Connor: To be used in the construction of this station?

Mr. Stratton: Yes, sir.

Mr. Connor: Where were the tool cars and lumber on the night he was injured?

Mr. Stratton: Well, they are situated all through that section there, the tool cars probably thirty feet from the main track, west of the main tracks.

Mr. Connor: In order to watch those tool cars and lumber, he would have to cross back and forth across the tracks?

Mr. Stratton: No, sir.

Mr. Connor: Was the lumber stored on a car?

Mr. Stratton: No, sir; piled in various places around.

Commissioner Mitchell: Was it piled outside from the station—across the track from the station?

Mr. Stratton: Yes, sir; from the old station.

Mr. Connor: Was it on the same side of the new station?

19 Mr. Stratton: Yes, sir.

Mr. Connor: Was there anything he was required to watch on the side of the old station?

Mr. Stratton: No, sir.

Mr. Connor: Were there any cars containing lumber he had to watch there?

Mr. Stratton: No, sir.

Mr. Connor: No cars containing tools?

Mr. Stratton: No, sir.

Commissioner Wainwright: I wish some one would give us some statement as to what this is all about; this is the first I have heard about it.

Mr. Failing: I will put another witness on. I can state briefly what the facts were; White was employed as a night watchman to look after the tools, to prevent them from being stolen, and to see that they were there; he was employed on the west side of the main tracks, on the new station work. The new station is being built about 300 feet west of the main tracks; White was employed on those tracks on the new station to watch matters, but for some reason went on the main tracks, on the old tracks, and was struck by a train. We claim he had no duties to perform, and had no business on the main tracks.

Commissioner Mitchell: Did you tell him the only place he had to go to watch the tools and lumber—did you direct him the only place he should patrol?

Mr. Stratton: Yes, sir.
Commissioner Mitchell: You told him not to get off that track?
Mr. Stratton: Yes, sir.
Commissioner Wainwright: When did you tell him not to leave the tracks, the new tracks?
Mr. Stratton: I just gave him the territory to watch.
Commissioner Mitchell: You told him to watch that particular territory?
Mr. Stratton: Yes, sir.
20 Commissioner Mitchell: What territory you told him to watch?
Mr. Stratton: From the station on Railroad Avenue, as we call it, to the south end of the dump or fill.
Commissioner Wainwright: When did you tell him that?
Mr. Stratton: Perhaps two weeks before that—showed that territory.
Commissioner Mitchell: Did you tell him where he must walk himself in order to watch that?
Mr. Stratton: No, sir.
Commissioner Mitchell: You did not tell him he wasn't to go on the old tracks to do the watching?
Mr. Stratton: No, sir.
Commissioner Mitchell: What instructions did you specifically give him as to where he should go?
Mr. Stratton: I told him to patrol along the new tracks, and that is where the new tracks will be, to the southerly point.
Commissioner Mitchell: If he had seen some one going around there who was probably going to steal some lumber, would he, in the course of his duties find out where the man was, and go to him to prevent him from stealing?
Mr. Stratton: He would not have to cross the tracks, no, sir.
Commissioner Mitchell: If he had seen some one on the other side of the old tracks?
Mr. Stratton: He would not have to go over there, no, sir.
Commissioner Wainwright: Suppose he wanted to chase the man or a tramp, might he not have gone there?
Mr. Stratton: He would not have to chase him any further than his territory.
21 Commissioner Mitchell: You did not instruct him not to leave his particular territory, did you?
Mr. Stratton: No, sir.
Commissioner Mitchell: You left that to his own discretion?
Mr. Stratton: I left that to his judgment.
Mr. Connor: Suppose he found a man stealing one of the tools, and the man ran with the tools, on the other side of the tracks, was he supposed to chase him on the other side of the railroad tracks?
Mr. Stratton: He was not supposed to do that; he had a telephone in case of anything like that, to call up some other authority.
Commissioner Mitchell: You did not give him any instructions at all about that?
Mr. Stratton: No, sir.

Commissioner Wainwright: What is the distance between the new and the old tracks?

Mr. Stratton: 200 feet.

Commissioner Wainwright: The new station is about opposite the old station.

Mr. Stratton: It is about.

Mr. Connor: Was that man appointed as a special officer?

Mr. Stratton: No, sir.

Mr. Connor: Was he a deputy sheriff or anything?

Mr. Stratton: No, sir.

Commissioner Wainwright: At what point was he killed?

Mr. Stratton: Right south of the station.

Commissioner Wainwright: Was that south of the line of the building of the old station?

Mr. Stratton: Yes, sir.

Commissioner Wainwright: How far south of that?

Mr. Stratton: We figure about 200 feet.

22 Commissioner Mitchell: You don't know what he was doing on the old tracks?

Mr. Stratton: No, sir.

Commissioner Mitchell: Was he cleaning a boiler?

Mr. Stratton: No, sir.

Commissioner Mitchell: Did he live some time afterwards?

Mr. Stratton: He lived some time after that.

Commissioner Wainwright: Is there any way of fixing the hour?

Mr. Stratton: It shows on the paper.

Mr. Connor: 7:08.

Commissioner Wainwright: In the morning?

Mr. Connor: No, eight minutes after seven o'clock P. M. Suppose a tramp jumped off a train that stood in front of the old station, would he be required to see what the tramp was doing?

Mr. Stratton: No, sir.

Mr. Connor: Suppose a tramp came from where the lumber was, would he be required to see what he was doing?

Mr. Stratton: Yes, sir.

Mr. Connor: Suppose a tramp took one of the tools and went across on the other side of the station, would't he be required to follow him?

Mr. Stratton: No, sir.

Mr. Connor: You would let him go?

Mr. Stratton: If he followed that man, he could not watch the job, according to my theory.

Commissioner Wainwright: Suppose the man had a piece of property in his hand, according to your theory of the duty of a night watchman, it would not be his duty to chase him any further than his territory, would it?

Mr. Stratton: I don't mean he has no right to chase any man any further than his territory.

23 Commissioner Mitchell: If a man came along, while you were in the territory in which you have charge now, and he was to take something from the property, and was to leave

the place where he took it, and went on some other tracks of the company, would you go there and bring him back?

Mr. Stratton: I don't know whether I would or not, if I go that far.

Commissioner Mitchell: You would let him get away with the property on the ground you had no right to leave the tracks upon which you were?

Mr. Stratton: I would follow my job, whatever I was looking.

Commissioner Mitchell: In the absence of any instructions?

Mr. Stratton: I don't know.

Commissioner Mitchell: You would go and get the property?

Mr. Stratton: I probably would, true, yes, sir.

Commissioner Wainwright: You would?

Mr. Stratton: Yes, sir. I mean about as far—until you were sure you could not catch him—I don't know—do you want me to answer that?

Commissioner Wainwright: Yes, sir.

Mr. Stratton: No, sir; I would not chase him any further.

Commissioner Wainwright: You would not chase him any further.

Mr. Stratton: No, sir.

Mr. Failing: Mr. Stratton, if any material is stolen, or anything unusual happens of that nature, do you receive a report of it?

Mr. Stratton: Yes, sir.

Mr. Failing: Did you receive any report on the following day of any material being stolen that night.

Mr. Stratton: No, sir.

Mr. Connor: The man was dead on the following day?

24 Mr. Stratton: Yes, sir.

Mr. Failing: Was there any man on duty that night who also would have made such a report?

Mr. Stratton: Yes, sir.

Commissioner Mitchell: What is his name?

Mr. Stratton: Mr. Mullarkey.

Commissioner Mitchell: What are his duties?

Mr. Stratton: Night watchman.

Commissioner Mitchell: What time did this man go on?

Mr. Stratton: Six thirty P. M.

Commissioner Wainwright: On what day did the accident occur?

Mr. Stratton: September 2nd.

Commissioner Wainwright: Was it light at that time?

Mr. Failing: I will now ask Frank Mullarkey some questions.

Mr. Failing: Mr. Mullarkey, in your own way, tell the Commission what you know about this accident?

Mr. Mullarkey: About seven o'clock in the evening of September 2nd, I was talking with White pertaining to the work, on this new station work at White Plains, and after I had told him what the duties were for the night, he started toward the new track, which was about 200 or 250 feet to the west of where we were standing. As he approached that track, he passed from my view. About one or two minutes afterwards, the timekeeper for the Construction Com-

pany asked me who was the man lying in the six feet of the old track. I said, I don't know, as I hadn't been up there. I immediately went up there, and discovered it was the night watchman, White, who had been struck by a south bound train. He lived about ten or fifteen minutes afterwards. He was taken to the hospital, but they refused to accept him, because he was dead. He was taken to the undertaking rooms in White Plains.

25 Mr. Failing: He was your co-laborer there at night?

Mr. Mullarkey: Yes, sir.

Mr. Failing: Had he any duties to perform over on the main tracks, or east of the main tracks?

Mr. Mullarkey: No, sir; his duties were all west of the old tracks.

Mr. Failing: Did he say anything to you about any duties that night over around the station—the old station, or around the old tracks?

Mr. Mullarkey: No, sir; he did not.

Mr. Failing: Was it customary for the day foreman to give you orders to be transmitted to him?

Mr. Mullarkey: Yes, sir; on account of my going to work at five thirty, and the gang starting about five thirty, or five thirty-five, if there were any orders to be left, they were always left with me and I communicated with the other night watchman.

Mr. Failing: Did you receive orders that night?

Mr. Mullarkey: Yes, sir.

Mr. Failing: For him?

Mr. Mullarkey: Yes, sir; I had two orders that night.

Mr. Failing: What were they?

Mr. Mullarkey: One order was for him to have a fire under the tar kettle on the new track in the morning, and also another order to keep a sharp lookout for trespassers committing nuisances around the blacksmith forge on the new work.

Commissioner Wainwright: Where did you tell him that, I believe you said you gave him some instructions when he went on the work?

Mr. Mullarkey: When I saw him, he had been on the work probably twenty-five or thirty-five minutes, and he asked me if

26 they required any fire under the tar kettle, and which one, as there were three kettles on the works. I said the center one at the baggage subway; I also told him I had communication signed by the timekeeper, that there were trespassers committing nuisances on the company's property, and for him to keep a sharp lookout for them.

Commissioner Wainwright: You did not tell him anything about the bounds he was to patrol?

Mr. Mullarkey: I had previous to this, I had received a communication from the foreman that he was to watch south of Main Street, to the south end of the fill.

Commissioner Wainwright: How far is that?

Mr. Mullarkey: That is probably 2,000 feet.

Mr. Failing: All on the west side of the main tracks?

Mr. Mullarkey: Yes, sir; from the west side of the tracks to the Bronx River.

Commissioner Wainwright: From the west side of the old tracks?

Mr. Mullarkey: From the west side of the old tracks to the Bronx River; previous to this, he had been watching to the north of Railroad avenue, and they concluded they would have him watch south of Railroad Avenue.

Commissioner Mitchell: On this particular night, you were instructed and directed to ask him to keep a sharp lookout for those who might be committing nuisances around there?

Mr. Mullarkey: Yes, sir.

Commissioner Mitchell: Did you give him that order?

Mr. Mullarkey: I read the order to him.

Commissioner Mitchell: Why was it required on that night to be particular about watching for those committing nuisances?

Mr. Mullarkey: It wasn't particular to watch that particu-
27 lar night, but to simply keep watching, because depredations had been committed previous to that night.

Commissioner Mitchell: This order was different, this night he was to keep a sharp lookout for this particular objectionable practice.

Mr. Mullarkey: Not exactly a sharp lookout, he was to keep his eye ready—it required a little more vigilance than on other nights.

Commissioner Mitchell: Do you think that was the reason he went on the main tracks, to try to keep a sharp lookout?

Mr. Mullarkey: No, sir.

Commissioner Mitchell: Why do you think it was?

Mr. Mullarkey: Because if he went to the east of the old tracks, where he was struck, he could not see the work, because the billboard obstructed what he had to watch.

Commissioner Mitchell: There were billboard- between the two tracks?

Mr. Mullarkey: Yes, sir.

Mr. Failing: Billboards between the old tracks and the new work?

Mr. Mullarkey: Yes, sir.

Commissioner Mitchell: Did the billboards extend 2,000 feet along the railroad?

Mr. Mullarkey: No, sir.

Commissioner Wainwright: That is only in front of the old station?

Mr. Mullarkey: Yes, sir.

Commissioner Wainwright: Do the billboards extend beyond the line of the building of the old station?

Mr. Mullarkey: About 200 feet.

Commissioner Wainwright: The billboards extend 200 feet?

Mr. Mullarkey: Yes, sir.

Commissioner Wainwright: Beyond the old building?

28 Mr. Mullarkey: Yes, sir.

Commissioner Wainwright: To the south?

Mr. Mullarkey: Nearly 200—I never measured it.

Commissioner Wainwright: What is the length of the billboards?

Mr. Mullarkey: I should imagine about 900 or 1,000 feet long; it runs from Bank Street to Railroad Avenue.

Commissioner Wainwright: What is the southerly point? Where

about in reference to the old station is the southerly point of the billboard?

Mr. Mullarkey: The southerly point of the billboard?

Commissioner Wainwright: Yes.

Mr. Mullarkey: At Bank Street or Martine Avenue; they come in together there.

Commissioner Wainwright: Was there on the old work, was there a comfort station there?

Mr. Mullarkey: On the old work?

Commissioner Wainwright: Yes; on the new work.

Mr. Mullarkey: Yes, sir; you mean a closet?

Commissioner Wainwright: Yes, sir; a closet.

Mr. Mullarkey: Yes, sir.

Commissioner Wainwright: For the men?

Mr. Mullarkey: Yes, sir.

Commissioner Wainwright: How long was it between the time you spoke to him and the time the train passed?

Mr. Mullarkey: About five or six minutes.

Mr. Connor: Was it part of his duties to keep trespassers off of the work?

Mr. Mullarkey: Yes, sir.

Mr. Connor: Was it part of his duty to see that no one stole any lumber or tools?

Mr. Mullarkey: Yes, sir.

Mr. Connor: On this night, in addition to this, he was
29 also required to build a fire under the tar kettle?

Mr. Mullarkey: Started in the morning—start the fire in the morning.

Mr. Connor: Was it left to his own judgment, as to how he was to start the fire under the tar kettle, and where to get the material?

Mr. Mullarkey: No, sir.

Mr. Connor: Did you tell him what material to use in starting the fire?

Mr. Mullarkey: Yes, sir.

Mr. Connor: What did you tell him?

Mr. Mullarkey: I told him to use the scrub wood that was right along by the tar kettle.

Mr. Connor: How often had he been required to start the fire under the tar kettle there?

Mr. Mullarkey: Four or five times.

Mr. Connor: Did you tell him on each previous occasion where he was to get the material?

Mr. Mullarkey: Yes, sir.

Mr. Connor: Why?

Mr. Mullarkey: He informed me on the first occasion he had never started a fire under a tar kettle.

Mr. Connor: Does that require much skill, to start a fire, under a tar kettle?

Mr. Mullarkey: Not any more than to start a fire in a cooking stove.

Mr. Connor: Where did he get the matches to start the fire?

Mr. Mullarkey: I furnished him with a box.

Mr. Connor: Did you furnish him with a box that night?

Mr. Mullarkey: I didn't furnish him with a box that night because he wasn't to build the fire until morning.

Mr. Connor: Do you know whether he had any matches with him or not?

Mr. Mullarkey: I could not say whether he had matches or not.

30 Mr. Connor: In performing his duty in watching out for the trespassers and preventing them from stealing tools or lumber he was to use his own judgment as to how to perform the work; answer the question.

Mr. Mullarkey: I don't understand that.

(Question read.)

Mr. Mullarkey: Yes, sir, outside of any orders he had received previous to the work.

Mr. Connor: You never gave him any orders not to cross the tracks on the east side of the tracks, did you?

Mr. Mullarkey: Yes, sir.

Mr. Connor: When?

Mr. Mullarkey: Excuse me; I didn't give him any orders, because I was not his superior in command, I was only an equal myself.

Mr. Connor: What were your duties?

Mr. Mullarkey: My duties were to watch the steam compressor, the crane, and to see that there was water in the boiler and sufficient steam in the morning to start the steam compressor, and the crane.

Mr. Connor: Where did you get the water?

Mr. Mullarkey: It is taken from the City main.

Mr. Connor: Which side of the track?

Mr. Mullarkey: On the west side of the tracks.

Mr. Connor: Do you have to cross to the east side of the tracks in the discharge of your duties?

Mr. Mullarkey: The old tracks?

Mr. Connor: Yes, sir.

Mr. Mullarkey: No, sir.

Mr. Connor: How long have you been employed as a watchman there?

Mr. Mullarkey: I have been employed there since—I do not just remember the time—sometime in March or April.

31 Mr. Connor: During that period of time, have you ever, in the course of your employment as a watchman, gone to the *the* east side of the tracks where the old station is?

Mr. Mullarkey: Yes, sir.

Commissioner Wainwright: What for?

Mr. Mullarkey: Curiosity, more than anything else.

Mr. Failing: Did you have to go there on the company's business or the company's duties?

Mr. Mullarkey: No, sir.

Mr. Failing: Did your duties require you to go over there in any way?

Mr. Mullarkey: No, sir; when I had occasion to go to the east side, over the old tracks, I went through Railroad Avenue where the en-

trance was, and went from Railroad Avenue over the regular crossing to the station.

Mr. Failing: You had drinking water on the west side of the track?

Mr. Mullarkey: Yes, sir.

Commissioner Wainwright: Do you use the closet on the east side or the west side?

Mr. Mullarkey: We used it on the west side of the rails.

Mr. Failing: How many were provided there for their use?

Mr. Mullarkey: There were two provided; one was provided at the new depot's site, and the other was to the south of the new—about one-half way down the new work.

Mr. Connor: Were your duties similar to his as watchman?

Mr. Mullarkey: No, sir; my duties were to watch the machinery part of the steam compressor and the boiler?

Mr. Connor: Were you supposed to keep off trespassers?

Mr. Mullarkey: Yes, as an employee of the company.

32 Mr. Connor: And to prevent them from stealing?

Mr. Mullarkey: Yes, sir; as an employee of the company.

Commissioner Wainwright: That is what the work of a watchman is, to watch the new construction of the station, working at contracts at White Plains?

Mr. Failing: Yes, sir.

Commissioner Wainwright: Those new tracks are not yet in operation?

Mr. Failing: No, sir.

Commissioner Wainwright: That is work is in the course of construction still?

Mr. Failing: Yes, sir.

Commissioner Wainwright: And was at the time of his death?

Mr. Failing: Yes, sir.

Commissioner Wainwright: The work is being done under contract?

Mr. Failing: Part of it, the main building.

Commissioner Wainwright: The building is being done by contract?

Mr. Failing: The building also.

Commissioner Wainwright: How about the tracks?

Mr. Failing: That is being done by the company.

Commissioner Wainwright: How about the electric work?

Mr. Failing: Except the main building.

Commissioner Wainwright: Can you state the number of through trains that go beyond the White Plains station per day, and the passenger trains, the end of whose journey is at North White Plains, and in the City of New York, as compared with those that go out of the State?

Mr. Failing: I have not, but a very large proportion stop at North White Plains.

33 Commissioner Wainwright: Is it not true, that very much the largest part of the traffic at White Plains, and even at the

old station, is local traffic—much the largest part of the passenger traffic is local traffic?

Mr. Failing: Yes, sir; as to the total number.

Commissioner Wainwright: As to the number of people who either stop at or pass by the White Plains Station?

Mr. Failing: Yes, but as to the number of trains, a large majority, the greatest percentage would be interstate trains.

Commissioner Mitchell: Where do they run to?

Mr. Failing: We have freight trains that may run to Massachusetts, and they may be local freight trains; we may have a part of a train, a carload or so, but that would be still an interstate train.

Commissioner Mitchell: You don't mean that the trains themselves are not between states?

Mr. Failing: No, sir; but I may say that a large majority of the trains running through White Plains are interstate trains.

Commissioner Mitchell: Yes, they carry some interstate commerce?

Mr. Failing: Yes, sir.

Commissioner Mitchell: There is not one train that travels into another state?

Mr. Failing: Oh, yes, our trains run into Massachusetts and to Pittsfield.

Commissioner Wainwright: You admit that the largest part of the trains that arrive at or stop at the White Plains Station, are trains that do not go beyond North White Plains?

Mr. Failing: That is true, as far as the running of the train, yes, sir. Mr. White was killed on the main line track.

34 Mr. Mullarkey: Yes, sir; on the south bound track.

Mr. Failing: On the south bound track, by a south bound train?

Mr. Mullarkey: Yes, sir.

Mr. Connor: Is that on the east or west side?

Mr. Failing: That is on the westerly track.

Mr. Connor: He was killed on the main tracks nearest to his work?

Mr. Mullarkey: Yes, sir.

Mr. Connor: Could he work from Main Street north or south without walking on the main track?

Mr. Mullarkey: Why, what do you mean by north or south?

Mr. Connor: If he started from Main Street to walk along and patrol his side, that he was supposed to watch, would not he naturally walk along the south bound tracks on the west side?

Mr. Mullarkey: No, sir; he would walk to the crossing at Railroad Avenue, to the west, to the depot site, and he would not have to cross any tracks.

Mr. Failing: Is not it a fact, if he walked on the track he could not see his work, by reason of the high board fence at that time?

Mr. Mullarkey: He could not see his work until he reached the south end of the billboard?

Commissioner Wainwright: Was his body found at the north of the end of the billboard, or south of the billboard?

Mr. Mullarkey: At the south of the billboard.

Commissioner Wainwright: At the point where he was found, is there a perfectly clear vision?

Mr. Mullarkey: No, sir.

Commissioner Wainwright: Was the billboard between the tracks?

Mr. Mullarkey: There were cars in there.

35 Commissioner Wainwright: I am speaking about the billboard.

Mr. Mullarkey: Was he clear of the billboard?

Commissioner Wainwright: Yes, was he clear of the billboard?

Mr. Mullarkey: Yes, sir.

Commissioner Wainwright: How far below the billboard?

Mr. Mullarkey: It probably was fifty feet south.

Commissioner Wainwright: There was the billboard, and then there were cars which intervened between the tracks and his work?

Mr. Mullarkey: Yes, sir.

Commissioner Wainwright: Was that a temporary siding in there?

Mr. Mullarkey: Yes, sir.

Commissioner Wainwright: How many cars were on the temporary siding?

Mr. Mullarkey: Seven.

Commissioner Wainwright: What was on the cars?

Mr. Mullarkey: Tools and lumber and material.

Commissioner Wainwright: Were they open cars?

Mr. Mullarkey: No, sir; they were all locked box cars.

Mr. Connor: How close to the track upon which he was killed?

Mr. Mullarkey: About twenty-five feet.

Mr. Connor: About how much space was there between the track upon which the cars were standing and the south bound track?

Mr. Mullarkey: About twenty-five feet at that point.

Mr. Connor: Twenty-five feet north and south or east and west?

Mr. Mullarkey: East and west.

36 Mr. Connor: Were there tracks between the south bound tracks and the tracks upon which the cars were standing?

Mr. Mullarkey: No, sir; there were not tracks between the south bound tracks and the tracks upon which the cars were standing.

Mr. Connor: What was there between them?

Mr. Mullarkey: There was a fill, a slight embankment; those tracks are slightly higher than the main tracks.

Commissioner Darlington: If it is held that he came under the act, what bearing has all this upon it? Negligence has nothing to do with it unless he deliberately intended to destroy himself, or was intoxicated.

Mr. Failing: The law holds that a man must be injured by accident arising out of and in the course of his employment; we claim while he may have been injured by accident, he was not injured arising out of his employment or in the course of his employment.

Commissioner Wainwright: He was not over ten or fifteen feet out of bounds?

Commissioner Darlington: It is only a question of whether he comes under the act because of the Interstate Commerce Act.

Commissioner Mitchell: Is there anyone representing the claimant here?

(No answer.)

37 *Affidavit of Fowler Brevoort.*

State Workmen's Compensation Commission.

Claim No. 31018.

In re Claim Arising Out of Death of JACOB WHITE.

STATE OF NEW YORK,
County of New York, ss:

Fowler Brevoort, being duly sworn, deposes and says he resides at White Plains, County of Westchester, State of New York, and that he is employed by the New York Central & Hudson River Railroad Company as a Locomotive Engineer, operating trains over the Electric Division between Grand Central Terminal, New York and North White Plains, N Y.

That on the 2nd day of September, 1914, deponent was engineman in charge of train 464, due to leave White Plains at 7:07 P. M. There were two cars in the train and when the station stop was made at White Plains the head end of the first car stood about opposite the south end of the station building.

Deponent further states that he saw deceased standing at a point south of the south end of the south-bound platform, on baggage crossing, and between the northbound and southbound tracks, while train was standing in station. Deponent paid no further attention to man, as he appeared to be clear of train, until he heard something strike side door at head end of train, when he brought his train to a stop and learned that the man had been struck.

38 This affidavit is made for submission to the State Workmen's Compensation Commission of the State of New York in connection with claim arising out of fatal injuries sustained by Jacob White, watchman, employed at White Plains by the New York Central & Hudson River Railroad Company on September 2nd, 1914.

FOWLER BREVOORT.

Subscribed and sworn to before me this 23rd day of October, 1914.

DAVID R. DUNNE,
Notary Public, New York County, No. 887.

New York Register's No. 5172.

39 *Affidavit of Fred Weaver.*

State Workmen's Compensation Commission.

Claim No. 31018.

In re Claim Arising Out of Death of JACOB WHITE.

STATE OF NEW YORK,
County of New York, ss:

Fred Weaver, being duly sworn, deposes and says that he resides at White Plains, County of Westchester, State of New York, and that he is employed by the New York Central & Hudson River Railroad Company as a Locomotive Engineer, operating trains over the Electric Division between Grand Central Terminal and North White Plains, N. Y.

That on the 2nd day of September, 1914, deponent was engineman in charge of train 459, due to arrive at White Plains, N. Y., at 7:09 P. M. Account of a south bound train standing in the station at White Plains, your deponent brought his train to a stop south of the station waiting for said southbound train to pull out clear of the station. While his train was standing as aforesaid, your deponent noticed a man, who later proved to be deceased, standing about 15 feet north of the south end of the southbound platform, near the west edge of the platform, facing toward the south. The southbound train stood in front of the station building, the south end of same being about 240 feet north of the point where man was standing.

Deponent further states that he did not see man struck by the southbound train and cannot say just where he was standing at the time of accident, deponent having started his train and moved
40 to the north when he received signal that southbound train had started to move.

This affidavit is made for submission to the State Workmen's Compensation Commission of the State of New York in connection with claim arising out of fatal injuries sustained by Jacob White, watchman, employed at White Plains by the New York Central & Hudson River Railroad Company, on September 2nd, 1914.

FRED WEAVER.

Subscribed and sworn to before me this 23rd day of October, 1914.

DAVID R. DUNNE,
Notary Public, New York County, No. 897,
New York Register's No. 5172.

Affidavit of Garrett H. Wilson.

State Workmen's Compensation Commission.

Claim No. 31018.

In re Claim Arising Out of Death of JACOB WHITE.

STATE OF NEW YORK,
County of New York, ss:

Garrett H. Wilson, being duly sworn, deposes and says that he resides at New York City, County of New York, State of New York, and that he is employed by the New York Central & Hudson
41 River Railroad Company as Superintendent of the Electric Division, and as such is in general charge of the operation of trains, etc., over this Division:

That the tracks running through White Plains, N. Y., are within the bounds of the Electric Division.

Deponent further states that the main line tracks running through White Plains on one of which said main line tracks train No. 464 is run, which train it is reported struck and killed Jacob White on September 2nd, 1914, are used by both interstate and intrastate trains, which carry both passengers, freight, baggage, express and mail; that the duties of deceased were to watch tracks, etc., in connection with new roadbed, tracks, station, etc., which new tracks and roadbed were to become main line tracks to carry interstate trains and that the decedent, in the performance of his duties as watchman, was employed in interstate commerce.

This affidavit is made for submission to the State Workmen's Compensation Commission of the State of New York in connection with claim arising out of fatal injury to Jacob White, watchman, employed at White Plains by the New York Central & Hudson River Railroad Company, on September 2nd, 1914.

GARRET H. WILSON.

Subscribed and sworn to before me this 22d day of October, 1914.

B. B. BWEARLEY,
Notary Public.

Bronx Co. No. 70, Register No. 865.
Certificate filed in New York County.

42 Mr. Failing: There is no question. I would like to put in our objections at this time. We object to the award being made.

First. That the said accident to deceased, Jacob White, did not arise out of and in the course of his employment.

Second. That when acting in the course of his employment by the New York Central & Hudson River Railroad Company, as such watchman, said White was employed in interstate commerce.

Third. That deceased was not engaged in intrastate commerce at the time of receiving the injuries resulting in his death within the provisions of Section 114 of Chapter 41 of the Law of 1914, of the State of New York, entitled "Workman's Compensation Law."

Fourth. That to award to the claimant compensation under the provisions of said "Workman's Compensation Law," will deprive the employer, The New York Central & Hudson River Railroad Company, of its property without due process of law, and will deny to it the equal protection of the laws in contravention of the provisions of the fourteenth amendment to the Federal Constitution.

Fifth. That to award to the claimant compensation under the provisions of said "Workman's Compensation Law" will deprive the employer, The New York Central & Hudson River Railroad Company, of its right of trial by jury guaranteed to it by Section 2 of Article 1 of the Constitution of the State of New York.

Sixth. That claimant is not entitled to an award by this Commission, and the application should be dismissed.

On motion of Commissioner Mosher, seconded by Commissioner Darlington, it was

43 Resolved: That Claim No. 31018, Jacob White, deceased, be allowed, and that compensation from September 2, 1914, be allowed, his widow, Mrs. Sarah White, aged sixty-one years, at the rate of 3.03 weekly, and that funeral expenses of $100 be awarded.

The vote on the foregoing resolution was — follows:

John Mitchell, aye,
Thomas Darlington, aye,
Howard T. Mosher, aye,
J. Mayhew Wainwright, aye,

making the vote unanimous.

Mr. Failing: I now give notice of appeal.

44 *Employer's Proposed Decision.*

State Workmen's Compensation Commission.

Claim No. 31018.

In the Matter of JACOB WHITE, Deceased, Employe,
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Employer.

The employer, The New York Central and Hudson River Railroad Company, herewith submits the following decision, and requests the Commission to make findings of fact, and conclusions of law, as follows:

Findings of Fact.

1. At the time of receiving injuries resulting in his death, Jacob White, was a resident of Yonkers, N. Y., and employed by the New York Central and Hudson River Railroad Company, as a watchman. The accident occurred at White Plains, N. Y., about eight minutes after seven in the evening of September 2nd, 1914.

2. The New York Central and Hudson River Railroad Company a corporation organized under the laws of the State of New York at the time of the said accident to White, operated, as a common carrier, a line of railroad extending from the City of New York N. Y., to Pittsfield, in the State of Massachusetts, passing through among other places, White Plains, N. Y.

45 3. At White Plains, at the time of said accident, the tracks of the railroad so operated by the New York Central and Hudson River Railroad Company, extended in a generally northerly and southerly direction and consisted of two main line tracks. Between the tracks was an island platform. Said tracks were used by said Railroad Company in both state and interstate commerce.

4. The old station, of said Railroad Company at White Plains was then located to the east of the tracks. The first track in front of the station was the north bound track. The next track on the west side of the island platform was the southbound track, and about twenty feet west of the southbound track a high billboard fence extended from north to south about 900 or 1,000 feet from Bank Street to Railroad Avenue. The southerly point of the billboard extended to Bank Street or Martine Avenue; it was about 200 feet south of the building line of the old station. Said billboard obstructed the view of a person in the vicinity of the old station, from seeing the work, and the section under construction to the west of the old tracks.

5. The section over which White's duties required him to work was wholly within the territory south of Main Street, to the south end of the fill, a distance of about 2,000 feet, and from the west side of the said old main tracks westerly to the Bronx River. At the time of the accident the railroad company was constructing a new station at White Plains, and was also laying new main tracks, which were 200 feet west of the old tracks. Such construction work was entirely to the west of the old main tracks as they existed at the time of said accident. No work was being performed by or for the Railroad Company to the east of the billboard fence.

46 All of the material used in the said construction work was west of the old main tracks and also west of the billboard.

6. The deceased went to work on the night of the accident at about 6:30 P. M. He was night watchman, and his duties required him to patrol the section where the new station was then being constructed to keep watch for fires and trespassers, and also to start a fire in the morning under a tar kettle. He reported for work to Samuel E. Stratton, said railroad's foreman of construction

from whom he received his instructions as to the section over which said White should watch.

7. In the course of his duties no work required White to go upon the old main tracks as they existed at the time. The cars containing the tools, lumber and all the material used in the work of constructing the new station and tracks were to the west of the old main tracks as they existed at the time and also to the west of the high board fence.

8. A few minutes after seven in the said evening, said railroad's train No. 464, southbound, came into the White Plains station, with engineer Brevoort in charge; the train, consisting of two cars, stopped in front of the station proper. The head end of the first car was about opposite the south end of the station building. The engineer as he was about to pull out of the station noticed, by the station lights, a man standing at the south end of the platform on the east side of the southbound track. Said railroad's train No. 459, a northbound train, at the time said train No. 464 was stopped at the station, was waiting to enter the station until the train No. 464 departed. The engineer of train No. 459 saw White standing upon the said platform, near the west edge of the same,
47 about 15 feet north of the south end of the southbound platform, near the west edge of the platform, and facing in a southerly direction, toward the incoming northbound train. When Engineer Brevoort on train No. 464 saw White standing upon the island platform, White, was removed from danger of being struck, by south bound train No. 464. As Engineer Brevoort was about to pull out of the station he sounded two short blasts of the whistle, as a signal for train 459 to pull into the station, the latter train having waited until the former pulled out. Thereafter deceased's body was found to the east of the southbound track over which train No. 464 had passed. His body was found about 200 feet south of the south line of the old station.

Conclusions of Law.

First. The said accident to deceased, Jacob White, did not arise out of and in the course of his employment.

Second. When acting in the course of his employment by the New York Central and Hudson River Railroad Company, as such watchman, said White was employed in interstate commerce.

Third. Deceased was not engaged in intrastate commerce at the time of receiving the injuries resulting in his death within the provisions of Section 114 of Chapter 41 of the Law of 1914 of the State of New York, entitled the "Workmen's Compensation Law."

Fourth. To award to the claimant compensation under the provisions of said "Workman's Compensation Law" will deprive the employer, The New York Central and Hudson River Railroad of its property without the due process of law, and will deny to it
48 the equal protection of the laws in contravention of the provisions of the fourteenth amendment to the Federal Constitution.

Fifth. To award to the claimant compensation under the provisions of said "Workman's Compensation Law" will deprive the employer, The New York Central and Hudson River Railroad Company, of its right of trial by jury guaranteed to it by Section 2 of Article 1 of the Constitution of the State of New York.

Sixth. Claimant is not entitled to an award by this Commission, and the application should be dismissed.

All of which is respectfully submitted.

Dated, Albany, N. Y., November 12, 1914.

VISSCHER, WHALEN & AUSTIN,
Attorneys for New York Central
and Hudson River Railroad Company.

Office and Post Office Address, 19 Tweddle Building, Albany, N. Y.

49 *Decision and Award.*

State Workmen's Compensation Commission.

Claim No. 31018.

In the Matter of the Claim of SARAH WHITE for Compensation for the Death of Jacob White
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer and Self-insurer.

This claim came on for hearing before the State Workmen's Compensation Commission at the office of the Commission No. 1 Madison Avenue, New York City, on October 20, 1914.

Appearances:

Jeremiah F. Connor, Counsel to State Workmen's Compensation Commission.

Willis H. Failing, Attorney for New York Central & Hudson River Railroad Co.

All the evidence submitted having been heard and duly considered, the Commission makes its Conclusions of Fact, Ruling of Law and Award, as follows:

Conclusions of Fact.

1. At the time of receiving the injuries resulting in his
50 death, Jacob White, was a resident of Yonkers, New York, and was employed as a watchman by New York Central & Hudson River Railroad Company to guard tools and materials at White Plains, New York, at night. Such tools and materials were for use in the construction of a new station and new tracks. The

e of the railroad extends from New York City, New York to Pitts-
d, Massachusetts, passing through White Plains, New York.
. On the night of September 2, 1914, the deceased reported for
y at 6:30 P. M. The new station was being constructed to the
t from the old station, a distance of about 200 feet. The mate-
ls and tools were in cars on sidings to the west of the main line
cks opposite the station and upon the premises west of the main
cks. The main line tracks run north and south or nearly so.
e old station is on the easterly side of the main line. The west-
y track of the railroad is the south bound track. The nearest
to the westerly track, containing tools and materials, was about
feet away. Along the westerly side of the south bound track
d in front of the old station, extends a bill board about 900 feet
ıg. The cars containing tools and materials extended beyond the
ıth end of the bill board and were in view of the place where
ceased was found dead.

3. On the night of September 2, 1914, at about 7:08 P. M.
ceased was struck on the south bound track by a south bound
in, to the south of the southerly end of said bill board and at a
int where he had a clear view of the said cars containing material
d tools. The objects and the premises which it was the duty of
e deceased to watch were situated west of the south bound track.
Deceased had no duties in connection with an inspection of
the track. There was another night-watchman, besides de-
ceased, named Frank Mullarkey, whose particular duties
re to watch a steam compressor and crane used on the new con-
ruction. On the night of the accident, Mullarkey had some special
structions which he had been directed by a superior to deliver to
ceased to the effect that the deceased was to exercise particular
gilance on that evening to catch thieves who were known to be in
e neighborhood and that the deceased was to start a fire under the
r kettle towards morning. These instructions were delivered by
ullarkey to deceased at a point to the east of the south bound track
d deceased after receiving said instructions proceeded westerly to
e premises which it was his duty to guard, namely: the premises to
e west of the south bound track. Within a minute or two of
ceiving these instructions, deceased was found dead on the south
ound track, having been struck by a south bound train. The duties
deceased did not require him to remain continuously to the west
the old tracks. The deceased was not engaged in interstate com-
erce.

4. The injury received by the deceased was an accidental injury
ising out of and in the course of his employment, and resulted in
s death. The injury did not result solely from the intoxication
the injured employee while on duty and was not occasioned by the
ilful intention of the injured employee to bring about the injury
death of himself or another.

5. The average weekly wage of the deceased was the sum of Ten
ıd 10/100 ($10.10) Dollars.

6. The deceased left him surviving a dependent wife, the claimant

herein, Sarah White, but no child or children, except that there may be a posthumous child.

52 *Ruling of Law.*

The claim comes within the provisions of Chapter 67 of the Consolidated Laws, being Chapter 816 of the Laws of 1913, as re-enacted and amended by Chapter 41 of the Laws of 1914, and amended by Chapter 316 of the Laws of 1914, known as the Workmen's Compensation Law.

Award.

Award of compensation at the rate of Three Dollars and three one hundredths ($3.03) per week is hereby made to Sarah White, widow of deceased, during her widowhood, together with the sum of One hundred Dollars ($100.00) for funeral expenses paid by her.

Dated, New York, October 20, 1914.

STATE WORKMEN'S COMPENSATION COMMISSION.
THOMAS DARLINGTON, *Chairman.*
JOHN MITCHELL.
H. T. MOSHER.
J. MAYHEW WAINWRIGHT.

Chairman Dowling not sitting.

53 *Employer's Exceptions.*

State Workman's Compensation Commission.

Claim 31018.

In the Matter of the Claim of SARAH WHITE for Compensation Arising Out of the Death of Jacob White
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer and Self-insurer.

Please take notice, that the employer The New York Central & Hudson River Railroad Company hereby excepts to the findings of fact and conclusions of law made and found by the Commission in the above claim and filed in the office of the said Commission upon which an award of compensation was made to the claimant.

1. It excepts to the "3" finding of fact in said award contained "On the night of September 2, 1914, at about 7:08 P. M. deceased was struck on the south bound track by a south bound train, to the south of the southerly end of said bill-board and at a point where he had a clear view of the said cars containing material and tools. The objects and the premises which it was the duty of the deceased to

watch were situated west of the south bound track. Deceased had no duties in connection with an inspection of the track. There was another night-watchman, besides deceased, named Frank
54 Mullarkey, whose particular duties were to watch a steam compressor and crane used on the new construction. On the night of the accident, Mullarkey had some special instructions which he had been directed by a superior to deliver to deceased to the effect that the deceased was to exercise particular vigilance on that evening to catch thieves who were known to be in the neighborhood and that the deceased was to start a fire under the tar kettle towards morning. These instructions were delivered by Mullarkey to deceased at a point to the east of the south bound track and deceased after receiving said instructions proceeded westerly to the premises which it was his duty to guard, namely: the premises to the west of the south bound track. Within a minute or two of receiving these instructions, deceased was found dead on the south bound track having been struck by a south bound train. The duties of deceased did not require him to remain continuously to the west of the old tracks. The deceased was not engaged in interstate commerce."

2. It excepts to the "4" finding of fact in said award contained "The injury received by the deceased was an accidental injury arising out of and in the course of his employment, and resulted in his death. The injury did not result solely from the intoxication of the injured employe while on duty and was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another."

3. It excepts to the ruling of law "The claim comes within the provisions of Chapter 67 of the Consolidated Laws, being Chapter 816 of the Laws of 1913, as re-enacted and amended by Chapter 41 of the Laws of 1914, and amended by Chapter 316 of the Laws of 1914, known as the Workmen's Compensation Law."

55 4. It excepts to the award "Award of compensation at the rate of Three Dollars and three one-hundredths ($3.03) per week is hereby made to Sarah White, widow of deceased, during her widowhood, together with the sum of One Hundred Dollars ($100.00) for funeral expenses paid by her."

The Defendant hereby excepts to the refusal of the Commission to find facts and conclusions of law as duly requested by the employer New York Central & Hudson River Railroad Company as follows:

5. It excepts to the refusal of the Commission to find as matter of fact as requested by the employer The New York Central & Hudson River Railroad Company, in and by its "1" request to find as follows:

"At the time of receiving injuries resulting in his death, Jacob White, was a resident of Yonkers, N. Y. and employed by the New York Central and Hudson River Railroad Company, as a watchman. The accident occurred at White Plains, N. Y., about eight minutes after seven in the evening of September 2nd, 1914."

6. It excepts to the refusal of the Commission to find as matter of fact as requested by the employer The New York Central & Hud-

son River Railroad company, in and by its "2" request t
follows:

"The New York Central and Hudson River Railroad Co
corporation organized under the laws of the State of New
the time of the said accident to White, operated, as a commo
a line of railroad extending from the City of New York,
Pittsfield, in the State of Massachusetts, passing through
other places, White Plains, N. Y."

7. It excepts to the refusal of the Commission t
56 matter of fact as requested by the employer the N
Central & Hudson River Railroad Company, in a
"3" request to find as follows:

"At White Plains, at the time of said accident the trac
railroad so operated by the New York Central and Hudso
Railroad Company, extended in a generally northerly and
direction and consisted of two main line tracks. Between t
was an island platform. Said tracks were used by said Railro
pany in both state and interstate commerce."

8. It excepts to the refusal of the Commission to find a
of fact as requested by the employer The New York Central
son River Railroad Company, in and by its "4" request t
follows:

"The old station, of said Railroad Company at White Pl
then located to the east of the tracks. The first track in fro
station was the north bound track. The next track on the
of the island platform was the southbound track, and abou
feet west of the south bound track a high billboard fence
from north to south about 900 or 1,000 feet from Ban
to Railroad Avenue. The southerly point of the billboard
to Bank Street or Martine avenue; it was about 200 feet sou
building line of the old station. Said billboard obstructed
of a person in the vicinity of the old station, from seeing t
and the section under construction to the west of the old tra

9. It excepts to the refusal of the Commission to find a
of fact as requested by the employer The New York Central
son River Railroad Company, in and by its "5" request t
follows:

57 "The section over which White's duties required
work was wholly within the territory south of Mai
to the south end of the fill, a distance of about 2,000 feet, a
the west side of the said old main tracks westerly to the Bro
At the time of the accident the railroad company was con
a new station at White Plains, and was also laying new mai
which were 200 feet west of the old tracks. Such construct
was entirely to the west of the old main tracks as they exist
time of said accident. No work was being performed by o
Railroad Company to the east of the billboard fence. A
material used in the said construction work was west of the
tracks and also west of the billboard."

10. It excepts to the refusal of the Commission to find
of fact as requested by the employer, The New York Centra

son River Railroad Company, in and by its "6" request to find as follows:

"The deceased went to work on the night of the accident at about 6:30 P. M. He was night watchman, and his duties required him to patrol the section where the new station was then being constructed, to keep watch for fires and trespassers, and also to start a fire in the morning under a tar kettle. He reported for work to Samuel E. Stratton said railroad's foreman of construction, from whom he received his instructions as to the section over which said White should watch."

11. It excepts to the refusal of the Commission to find as matter of fact as requested by the employer The New York Central & Hudson River Railroad Company, in and by its "7" request to find as follows:

"In the course of his duties no work required White to go upon the old main tracks as they existed at the time. The cars containing the tools, lumber and all the material used in the work of constructing the new station and tracks were to the west of the old main tracks as they existed at the time and also to the west of the high board fence."

12. It excepts to the refusal of the Commission to find as matter of fact as requested by the employer. The New York Central & Hudson River Railroad Company, in and by its "8" request to find as follows:

"A few minutes after seven in the said evening, said railroad's train No. 464, southbound, came into the White Plains Station, with engineer Brevoort in charge; the train, consisting of two cars, stopped in front of the station proper. The head end of the first car was about opposite the south end of the station building. The engineer as he was about to pull out of the station noticed, by the station lights, a man standing at the south end of the platform on the east side of the south bound track. Said railroad's train No. 459, a northbound train, at the time said train No. 464 was stopped at the station, was waiting to enter the station until the train No. 464 departed. The engineer of train No. 459 saw White standing upon the said platform, near the west edge of the same, about 15 feet north of the south end of the southbound platform, near the west edge of the platform and facing in a southerly direction, toward the incoming northbound train. When Engineer Brevoort on train No. 464 saw White standing upon the island platform, White, was removed from danger of being struck, by southbound train No. 464. As Engineer Brevoort was about to pull out of the station he sounded two short blasts of the whistle, as a signal for train 459 to pull into the station, the latter train having waited until the former, pulled out. Thereafter deceased's body was found to the east of the southbound track over which train No. 464 had passed. His body was found about 200 feet south of the south line of the old station."

13. It excepts to the refusal of the Commission to find as conclusion of law as requested by the employer. The New York Central & Hudson River Railroad Company in and by its "First" proposed conclusion of law as requested by the employer as follows:

"The said accident to deceased, Jacob White, did not arise out of and in the course of his employment."

14. It excepts to the refusal of the Commission to find as conclusion of law as requested by the employer The New York Central & Hudson River Railroad Company in and by it "Second" proposed conclusion of law as requested by the employer as follows:

"When acting in the course of his employment by the New York Central and Hudson River Railroad Company as such watchman, said White was employed in interstate commerce."

15. It excepts to the refusal of the Commission to find as conclusion of law as requested by the employer The New York Central & Hudson River Railroad Company in and by its "Third" proposed conclusion of law as requested by the employer as follows:

"Deceased was not engaged in intrastate commerce at the time of receiving the injuries resulting in his death within the provisions of Sect-on 114 of Chapter 41 of the Law of 1914 of the State of New York, entitled the "Workman's Compensation Law."

60 16. It excepts to the refusal of the Commission to find as conclusion of law as requested by the employer The New York Central & Hudson River Railroad Company in and by its "Fourth" proposed conclusion of law as requested by the employer as follows:

"To award to the claimant compensation under the provisions of said Workman's Compensation Law will deprive the employer, The New York Central & Hudson River Railroad Company of its property without due process of law, and will deny to it the equal protection of the laws in contravention of the provisions of the fourteenth amendment to the Federal Constitution."

17. It excepts to the refusal of the Commission to find as conclusion of law as requested by the employer The New York Central & Hudson River Railroad Company in and by its "Fifth" proposed conclusion of law as requested by the employer as follows:

"To award to the claimant compensation under the provisions of said "Workman's Compensation Law" will deprive the employer, The New York Central & Hudson River Railroad Company, of its right of trial by jury guaranteed to it by Section 2 of Article 1 of the Constitution of the State of New York."

18. It excepts to the refusal of the Commission to find as conclusion of law as requested by the employer The New York Central & Hudson River Railroad Company in and by its "Sixth" proposed conclusion of law as requested by the employer as follows:

"Claimant is not entitled to an award by this Commission,

61 and the application should be dismissed."

Dated, Albany, N. Y., December 14, 1914.

VISSCHER, WHALEN & AUSTIN,

Attorneys for New York Central & Hudson River Railroad Company, Employer.

Office and Post Office Address, 19 Tweddle Building, Albany, N. Y.

To the Secretary of the State Workman's Compensation Commission and to James A. Parsons, Esq., Attorney General of the State of New York, Capitol, Albany, N. Y.

62 *Opinion.*

State Workmen's Compensation Commission.

Claim 31018.

In the Matter of the Claim of SARAH WHITE for Compensation Arising Out of the Death of Jacob White
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Employer and Self-Insurer.

The duties of the employee were to act as a watchman in relation to tools and materials used by the railroad company for the erection of a new station and tracks. The deceased was struck by a train while standing on the tracks of the company adjacent to the new construction work. Held: (1) That the injuries were accidental injuries arising out of and in the course of the employment: (2) That the duties of the deceased had no connection with interstate commerce, notwithstanding the fact that the station and tracks when constructed were to be used both for interstate and intrastate commerce.

Appearances:

Jeremiah F. Connor, Counsel to the State Workmen's Compensation Commission.

Vischer, Whalen & Austin and Willis H. Failing, Attorneys for the Employer.

63 *Opinion of Commission.*

By the Commission: Claim is presented by Sarah White because of the death of her husband, Jacob White, an employee of the New York Central & Hudson River Railroad Company. The deceased was employed by the company as a watchman for the purpose of guarding tools and materials which were to be used for the erection of a new station and new tracks at White Plains, New York. The new station and tracks when completed were to be used in both interstate and intrastate commerce. All the tools and materials which the deceased was required to watch were located immediately to the west of the present tracks of the railroad company at White Plains. Shortly after the deceased reported for duty on the night of September 2, 1914, he was struck by a train while standing on one of the present tracks of the company immediately adjoining the new construction work. Objection is made to the allowance of this claim upon the ground that the injuries which resulted in his death did not arise out of and in the course of his employment, and that the deceased at the time of his death, was engaged in interstate commerce or was working upon an instrumentality of interstate commerce.

The first objection is based upon the contention that the section over which his duties required him to work was wholly to the west of the old main tracks and that in the course of his duties, no work required deceased to go upon such tracks as they existed at the time of the accident. We do not regard this objection as material. The deceased had received no instructions that he was not to go upon the tracks. His duties were such as would ordinarily devolve upon an employee who is required to guard the property of his master and to see that such property is not stolen or carried away from the premises. This duty would naturally give the employee considerable leeway as to the manner in which his
64 work was to be performed. There is of course, no evidence in the case to show his purpose in going upon the old main line track at the time of the accident. It does appear, however, that a few minutes prior to the accident he had received special instructions to exercise particular vigilance to watch out for thieves who were known to be in the neighborhood. There were two passenger trains at White Plains station at the time and it is natural to presume that he may have gone upon the tracks to watch out for suspicious characters and to ascertain whether any one departing from either of the trains was about to enter the premises where the tools and materials were located. In this connection attention is called to section 21 of the Workmen's Compensation Law under which a presumption is created, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the chapter and that the injury was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another. In view of the duties of the deceased and all the circumstances surrounding the accident, this seems to be an instance which is clearly covered by the presumption created under this section of the Act. The injury happened in the course of his employment and upon the premises of his employer. It was a risk which might have been contemplated by a person entering the employment, and was incidental to the employment. It had relation to his work and was a risk in the regular line of his duties. We have no hesitation therefore, in finding that his death was due to accidental injuries which arose out of and in the course of his employment.

Upon the question of interstate commerce it is only necessary to call attention to the fact that the duties of the deceased were
65 confined entirely to new construction work. It is well settled that employees engaged in the construction of a station or track which has not as yet become an instrumentality of interstate commerce are not subject to the Federal Employers' Liability Act.

Pederson vs. D. L. & W. R. R. C., 229 U. S. 146.
Jackson vs. C. M. & St. P. R. R. Co., 210 Fed. Rep., 495.

The United States Supreme Court in the Pederson case (supra) while holding that the Federal Employers' Liability Act applies to an employee repairing a bridge in actual use, stated:

"Of course we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities of interstate commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such" (p. 152).

In the Jackson case (supra) the plaintiff was injured while building a tunnel which was to be used by the defendant in the transportation of interstate commerce, as a cutoff shortening the defendant's present route. The court held that the case did not come within the Federal Employers' Liability Act because the tunnel had not yet been used in interstate commerce.

It follows that the deceased was not engaged in interstate commerce and that section 114 of the Workmen's Compensation Law has no application to the facts in this case.

Award of compensation will be made accordingly. All concur. Dated: November 21, 1914.

66 *Employer's Notice of Appeal.*

Supreme Court, Appellate Division, Third Judicial Department.

State Workmen's Compensation Commission.

Claim 31018.

In the Matter of the Claim of SARAH WHITE for Compensation Arising Out of the Death of Jacob White
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer and Self-insurer.

SIRS: Please Take Notice that the employer, New York Central and Hudson River Railroad Company, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department from the award of the State Workmen's Compensation Commission made herein, and entered in the office of the said Commission on the 21st day of November, 1914, and the said employer appeals from said award and from the whole and each and every part thereof.

Dated, Albany, N. Y. Dec. 14, 1914.

VISSCHER, WHALEN & AUSTIN,
Attorneys for N. Y. C. & H. R. R. R. Co., Employer.

Office and Post Office Address, 19 Tweddle Building, Albany, N. Y.

67 To James A. Parsons, Esq., Attorney General of the State of New York,
Joseph H. Hollands, Esq., Clerk Supreme Court, Appellate Division, Third Judicial Department,
State Workman's Compensation Commission,
Jeremiah Connor, Esq., Counsel State Workman's Compensation Commission, and
Mrs. Sarah White.

68 *Stipulation.*

Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of the Claim of SARAH WHITE for Compensation Arising Out of the Death of Jacob White
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer and Self-insurer.

It is hereby stipulated by and between the attorneys representing the parties in the above entitled matter that the following may be, and hereby are, omitted from the record on the appeal in the above entitled action to the Appellate Division, Third Judicial Department:

Notice of Hearing, Form C-28.
Proof of death, affidavit of Wife, Form C-24.
Proof of death by Undertaker, Form C-21.
Proof of Death by Clergyman, Form C-22.

It is further stipulated, by the said attorneys that with the exception of the papers and records stipulated herein to be omitted from the record, the foregoing papers and records are true and correct copies of the papers and records on file in the office of the State Workmen's Compensation Commission, and that they con-
69 stitute and include all of the records including pleadings, proceedings, and evidence of every nature which were before the said Commission at the time of the consideration and the rendering of its decision and award and the notice of appeal and the whole of said record and papers on file: and that the said papers and record need not be certified and that the foregoing is stipulated as the record before the Commission in the determination of the said claim.

Dated, December 29, 1914.

JEREMIAH F. CONNOR,
Attorney for State Workmen's Compensation Commission, Respondent.
JAMES A. PARSONS,
Attorney General of the State of New York, Respondent.
VISSCHER, WHALEN & AUSTIN,
Attorneys for New York Central & Hudson River Railroad Company, Employer and Self Insurer, Appellant.

70 *Order of Chairman to File with the Appellate Division Order Settling and Filing Case.*

Pursuant to the foregoing stipulation, it is Ordered, that the foregoing printed record is hereby settled as and for the record on appeal herein and is hereby ordered filed in the office of the

Clerk of the Appellate Division of the Supreme Court, Third Department.

Dated, New York City, Dec. 29, 1914.

ROBERT E. DOWLING,
Chairman of the State Workmen's Compensation Commission.

71 *Order of Affirmance of the Appellate Division.*

At a Term of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, Held at the Appellate Division Court Rooms, in the City of Albany, N. Y., Commencing on the 4th Day of May, 1915.

Present:

Hon. Walter Lloyd Smith, Presiding Justice.
Hon. John M. Kellogg,
Hon. George F. Lyon,
Hon. Wesley O. Howard,
Hon. John Woodward,
Associate Justices.

In the Matter of the Claim of SARAH WHITE for Compensation Arising Out of the Death of Jacob White, Claimant-Respondent,

against

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Employer and Self Insurer, Appellant.

The above named New York Central and Hudson River Railroad Company, having appealed from the award of the Workmen's Compensation Commission entered in the office of said Commission on the 20th day of October, 1914, whereby compensation was awarded to the above named Sarah White, at the rate of $3.03 per week during her widowhood, together with the sum of $100 for funeral expenses; and said appeal having come to be heard
72 in this court, and having been argued by William L. Visscher, Esq., of Counsel for the appellant, and E. C. Aiken, Deputy Attorney General, for the Workmen's Compensation Commission, and due deliberation having been had thereon:

Now, on motion of Egburt E. Woodbury, Attorney General and attorney for the Workmen's Compensation Commission, it is

Ordered, that the award of the Workmen's Compensation Commission appealed from be, and the same hereby is in all respects affirmed.

[L. S.] JOSEPH H. HOLLANDS, *Clerk.*

A copy.
JOSEPH H. HOLLANDS, *Clerk.*

73 *Order of Affirmance, State Workmen's Compensation Commission.*

Before the State Workmen's Compensation Commission.

In the Matter of the Claim of SARAH WHITE for Compensation under the Workmen's Compensation Law, Arising Out of the Death of Jacob White,

against

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer and Self-insurer.

Whereas, the New York Central and Hudson River Railroad Company, having appealed to the Appellate Division of the Supreme Court, Third Department, from the award and decision of the Work-Men's Compensation Commission made October 20, 1914, allowing compensation to the above named Sarah White, widow of Jacob White, for the death of Jacob White at the rate of $3.03 per week, during her widowhood, together with $100.00 for funeral expenses, and said appeal having been heard by said Appellate Division of the Supreme Court and the said Appellate Division of the Supreme Court *having* at a term commencing May 4, 1915, having duly affirmed the award and decision of the Workmen's Compensation Commission by an order duly filed with the Clerk of the Appellate Division and the papers on appeal herein together with a certified copy of said order of the Appellate Division having been remitted to the Workmen's Compensation Commission and having been duly filed.

74 Ordered, that the order of the Appellate Division be and the same hereby is made the order of the State Workmen's Compensation Commission and that the award of compensation made herein October 20, 1914, be and the same hereby is affirmed.

Dated, May 14, 1915.

CHARLES D. O'CONNELL,
Ass't Secretary.

Correspondence Between State Workmen's Compensation Commission and Employer Requesting Leave to be Relieved from the Operation of Compensation Act.

New York State Workmen's Compensation Commission,
1 Madison Avenue, New York, N. Y.

Employer's Application to Carry His Own Risk by Furnishing Satisfactory Proof, Etc.

The undersigned (hereinafter referred to as the applicant) hereby makes the following declarations for the purpose of enabling the State Workmen's Compensation Commission of New York to make a finding of facts, either holding that the applicant is not bound

by the compensation law or that it possesses sufficient financial ability to render certain the payment of compensation to its injured employes or to dependents of employes who die in consequence of accident.

Applicant hereby makes a statement of facts as follows:

1. Name of applicant: New York Central & Hudson River Railroad Company.

75 Nature of business: Transportation of persons and property by railroad in foreign, interstate and intrastate commerce.

Address: Grand Central Terminal, New York, N. Y.

2. Applicant's assets are of the value of: $698,594,763.93.

Capital stock: 225,576,166.00.

Applicant's liabilities less capital stock: 473,018,597.93. (A detailed statement of applicant's assets and liabilities is filed herewith.)

3. Description of employment, etc. Location of plant or plants: Maintenance and operation of railroad. Throughout the States of New York, Massachusetts, New Jersey, Pennsylvania and the Province of Quebec.

(N. Y. C. & H. R. R. R. Co.)

(Application for ruling of exclusion or permission to self-insurer.)

Kinds of employment. Last 6 mos. 1913.

Men wage expenditure. Last 6 mos. 1914 (Est.)

Men wage expenditure. (Here follow upwards of fifty items under above headings, with the totals shown below.)

Total: 56,382. $23,541,013.64, 48,872, $20,797,595.31.

(N. Y. C. & H. R. R. R. Co. application for ruling of exclusion or permission to self-insure.)

76 The above statement covers approximately the entire payroll of the applicant in the State of New York, including officers and employes not engaged in hazardous employments, and also those who are not engaged in the construction, maintenance and operation of the railroad. Where the compensation averages in excess of $1,500, per annum the excess has been omitted. It is the opinion of the applicant that under Section 114 of the New York Compensation Law none of its employes are within the law.

4. (*a*) Do you maintain a hospital or hospitals in connection with your works or plant?

Yes.

(*b*) If your answer be "yes" give a description of such hospital or hospitals.

We have contracts with many hospitals on the road and in addition maintain emergency hospitals at several of our larger places.

(*c*) Are you a member of an association for accident prevention?

No, we maintain our own organization.

(*d*) What is the plan of such organization?

We maintain a separate bureau and organization consisting of a General Safety Agent with assistants and of numerous committees in shops and on the various divisions.

(*e*) Do you have in your employ one or more individuals whose

regular duty is to make daily inspection of your plant or
77 works for the purpose of securing compliance with statutes or general orders of the Commissioner of Labor relative to safety and sanitation?

Aside from the necessary inspection in shops, the safety organization has gone beyond the requirements of the state inspectors in perfecting and applying safe guards.

(*f*) If your answer be "yes" give the names and addresses of such person or persons.

Mr. Marcus A. Dow, General Safety Agent, Grand Central Terminal, New York, N. Y.

5. Applicant asks that a finding of fact be made by the Commission on one of the following propositions:

First. The applicant invites the New York Workmen's Compensation Commission to consider the character of the service rendered by it and its employes and to rule, in view of Section 114, that as a carrier by railroad "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States," it does not come within the purview of the compensation act and that no action is necessary on the part of the applicant under Section 50 of the act providing for a method of assuring compensation.

Second. If the Commission finally concludes that the act does in fact apply to any of the employes of the applicant, then, in view of its financial condition and the evident limited application of the act to applicant, it requests the State Workmen's Compensation Commission to authorize self-insurance without the deposit of securities under Sub-division 3 of Section 50 of the act during the last half of the current year, or until definite determination is made of the questions involved.

78 (N. Y. C. & H. R. R. R. Co. application for ruling of exclusion or permission to self-insure.)

The applicant does not care to avail itself of the permission to make a contract, in accordance with Section 114, with its employes to become bound by the act.

If the Commission desires, applicant is prepared to furnish it with additional facts or evidence supporting the above allegations.

Dated at New York, N. Y., this 23rd day of June, 1914.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

(Sgd.) By FRANK V. WHITING,
General Claims Attorney,
Grand Central Terminal, New York, N. Y.

[SEAL.]

Attest:

(Sgd.) D. W. PARDEE, *Secretary.*

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of July, 1914, before me, a Notary Public, in and for said county, appeared personally Frank V. Whiting, General Claims Attorney of the New York Central & Hudson River Railroad Company, who, being first duly sworn, declared that the facts set forth in the foregoing application are true.

—— ——, *Notary.*

(My commission expires —— —, —.)

79 New York Central Lines.

June 23, 1914.

New York State Workmen's Compensation Commission, 1 Madison Avenue, New York, N. Y.

GENTLEMEN: The New York Central & Hudson River Railroad Company respectfully submits herewith an application to the New York State Workmen's Compensation Commission for a ruling that it does not come within the scope of the Workmen's Compensation Law, or, for authority to carry its own risk thereunder.

The application is submitted in alternative form for convenience and to expedite the disposition of the same.

The applicant has asked for a general ruling that its employes are not within the law, and in this connection the Commission is also asked to consider the character of the service rendered by the applicant and its employes under Section 114, the carrier being a railroad "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States" the applicant believing that its employes do not come within the law.

In this connection attention is called to the following decisions of the United States Supreme Court dealing with the application of the Federal Employers' Liability Act to employes of interstate carriers, and also to a ruling of the Ohio State Liability Board of Awards in considering a similar section of the Ohio law, to wit: Section 51, dealing with interstate commerce, that board holding that the law is not applicable to interstate carriers or their employes:

80 Pedersen vs. D. L. & W. R. R. Co., 229 U. S., 146;
St. L. S. F. & Tex. Ry. vs. Seale, 229 U. S. 156;
G. C. & S. F. Ry. Co. vs. McGinnis, 228 U. S. 173;
Seaboard Air Line vs. Horton, U. S. Advance Opinions No. 13, page 635;
Illinois Central R. R. Co. vs. Behrens, 193 Fed. 581, reversed by U. S. Supreme Court, U. S. Advance Opinions, No. 13, page 646;

Carr vs. N. Y. C. & H. R. R. Co., 77 N. Y. Miscl. 346, this case being unanimously affirmed by the Appellate Division, in 157 A. D. 941, to which special attention is called.

In the Carr case the Appellate Division held that notwithstanding the fact that Carr was at the time of injury engaged in an act that momentarily related to the movement of two cars of intrastate freight, his connection with interstate service was continuing, and that he was entitled to recover under the Federal Employers' Liability Act, for the reason that the carrier and the employe were engaged in interstate commerce at the time of the accident.

It seems clear to the applicant that to the extent that the intrastate character of the service rendered by the carrier and employes is not clearly separable and distinguishable from the interstate character of the service rendered by both, the compensation law does not apply, and it is obvious that in determining whether or not an employe or his dependents are entitled to compensation, the determination must be based upon the accustomed service of the employer as well as the employe.

81 Even though it should be claimed that the compensation act would apply to employes injured when actually engaged in an act of intrastate transportation, it is obviously impossible to say antecedent to performance of service in what proportion the time of an employe will be given to such act severable from his service in the movement exclusively interstate transportation, let alon*g* the time engaged in handling transportation both state and interstate, during which time it is clear that he is engaged in interstate commerce within the decisions of the United States Supreme Court, and for this reason the applicant submits its payroll statement covering aggregate service within the State of New York.

The payroll further contains salaries of officers and clerical forces not engaged in the construction, operation or maintenance of the railroad.

The applicant contends that as to employers engaged in intrastate and interstate and foreign commerce, the act, by virtue of Section 114, is in fact a voluntary and not a compulsory law.

Yours very truly,

(Signed) FRANK V. WHITING,
General Claims Attorney.

New York Central Lines.

June 26, 1914.

New York State Workmen's Compensation Commission, 1 Madison Avenue, New York, N. Y.

GENTLEMEN: In accordance with the suggestion of Mr. Wainwright this morning, I have ascertained that our payroll for the six

82 months ending December 31st, 1913, covering our passenger conductors, trainmen and motormen, in our suburban service in New York aggregated $174,834.17 and a reasonable estimate for the last half of 1914 is that it will not exceed this amount.

I wish to state that we consider it impossible to separate our payroll to determine in advance of an accident whether or not an employe will be under the Federal Act, but based on our experience in handling claims heretofore it is our opinion that ninety-eight per cent of

the accidents at least are to employes when engaged in interstate commerce.

I would also call attention to the fact that in estimating our premium I think it is improper to charge us a flat rate of $14.85 for all classes of employment. We have thousands of employes who are not connected with the operation of trains, such as carpenters, blacksmiths, machinists, and the like, who, at least if employed by another employer, would be entitled to a lower rate, and I submit that in estimating the premium upon whatever proportion of the payroll you decide to estimate it on, that the various rates for the different occupations should prevail.

Yours very truly,

(Signed) FRANK V. WHITING,
(General Claims Attorney).

83 STATE WORKMEN'S COMPENSATION COMMISSION,
THE CAPITOL, ALBANY, NEW YORK,
June 29, 1914.

Attention of Frank V. Whiting, General Claims Att'y.

The New York Central Lines, Grand Central Terminal, New York, N. Y.

GENTLEMEN: Your application to carry your own risk has been granted on condition that you deposit securities to the amount of $300,000.00 and $30,000.00 in cash, and that you notify this Commission of your intentions to increase your mortgages or funded indebtedness. Your privilege to carry your own risk will be revoked if you fail to notify this Commission of such intended increases in your mortgages or funded indebtedness.

The only securities accepted by the Commission will be United States Bonds, New York State Bonds or New York City Bonds.

The Commission declined to rule that you do not come within the scope of the Workmen's Compensation Law, and also declined to grant you the privilege of carrying your own risk unless securities and cash are deposited with them in accordance with Section 50, Sub-Division 3 of the Workmen's Compensation Law.

Very truly yours,

N. J. ROSENBERG,
Assistant Secretary.

N. J. R./M. B.

84 July 1, 1914.

New York State Workmen's Compensation Commission, 1 Madison Avenue, New York, N. Y.

GENTLEMEN: Referring to the application made by this Company to the Commission, dated June 23rd, 1914, for a finding of facts on part of the Commission, either holding that the applicant is not bound by the compensasation law or that it possesses sufficient financial ability to ren-

der certain the payment of compensation to its injured employes or to dependents of employes who die in consequence of accident, and further to the Commission's reply under date of June 29th, 1914, together with finding of the Commission that it is satisfied with the proof presented in such application tending to establish the financial ability of the undersigned so to pay compensation, and fixing the amount of security which the undersigned is required to deposit under Subdivision 3 of Section 50 in the sum of $300,000 and asking for a cash deposit under Section 25 of $30,000.

The undersigned, without prejudice to its contention that it does not come within the provisions of the Workmen's Compensation Law, and reserving all contentions as to the invalidity of said act or any part thereof, hereby tenders to the Commission $300,000 in securities prescribed by Section 13 of the insurance law of the State of New York, and also cash in the form of a certified check for $30,000 in compliance with such finding.

The undersigned declines to comply with the other conditions specified by the Commission in its "Form of Decision" on said application, or to enter into the "Agreement and Undertaking" on
85 the ground that the Commission is without legal authority to impose the same. The said securities are hereby tendered with the understanding on the part of the undersigned that the same are to be held and disposed of by the Commission strictly in accordance with the provisions and for the purposes provided in the Workmen's Compensation Act, and not otherwise, and that the interest payable upon said securities, so long as they are held by the Commission, will be turned over to and belong to the undersigned, unless required to be used for some purpose provided by the Act.

The sum of $30,000 deposited with the Commission, pursuant to Section 25 of the compensation act, shall be used only for the purposes set forth and in the manner provided in said section, the interest received by the Commission on this deposit to be credited to the account of the undersigned.

The undersigned will comply with all rules and requirements that may be lawfully made and promulgated by the Commission.

Respectfully yours,

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

(Sgd.) By A. H. SMITH, *President.*

86 STATE WORKMEN'S COMPENSATION COMMISSION,
THE CAPITOL, ALBANY, NEW YORK,
July 21, 1914.

Attention of Frank V. Whiting, General Claims Att'y.

New York Central & Hudson River R. R. Co., Grand Central Terminal, New York, N. Y.

GENTLEMEN: By direction of the Commission, I herewith submit the resolution adopted by the Commission in lieu of the letter for-

warded to you on June 29th giving you information as to conditions on which you were granted the privilege to carry your own risk.

Resolved: That the application of the New York Central & Hudson River Railroad Company for self-insurance, under Subdivision 3 of Section 50 of the Act, be granted upon their depositing with the Commission Three Hundred Thousand Dollars ($300,000.00) in securities, and Thirty Thousand Dollars ($30,000) in cash for the payment of current claims, upon their executing the agreements relating to deposit of securities and of cash in the modified form approved and reported to the Commission by the Committee on Rules, and that the modified decision of the Commission with respect to the New York Central & Hudson River Railroad Company shall be a substitute for all previous actions.

The securities accepted by the Commission shall be in the stocks or bonds of the United States, or of this State or in the bonds of a county or incorporated city in this State, authorized to be
87 issued by the legislature, not estimated above their par or their current market value.

The deposit required is specified in the enclosed form, which you are requested to sign and acknowledge before the proper officer.

Please return immediately the enclosed forms with the required bonds and cash. Upon their receipt acknowledgment will be given.

Please be advised that this Commission request you to inform them if at any time you contemplate increasing your mortgages or funded indebtedness. Failure to notify this Commission will be followed by a revocation of your privilege.

Yours very truly,

(Sgd.) N. J. ROSENBERG,
Ass't Sec'y.

N. J. R./M. B.

Form of Agreement and Undertaking of Employer Granted the Privilege of Paying Compensation Without Insuring.

We, The New York Central & Hudson River Railroad Company, an employer, engaged in the business of transportation by railroad, with headquarters situated at New York, N. Y., having applied to the State Workmen's Compensation Commission under subdivision 3 of Section 50 of the Workmen's Compensation Act for the privilege of paying compensation without insuring, which application has been granted,

Do hereby undertake and agree as a condition precedent to
88 such grant taking effect, without prejudice to our contention that we do not come within the provisions of the Workmen's Compensation Act, and reserving all contentions as to the invalidity of said Act or any part thereof:

1. That we will, and hereby do, make a deposit with the Commission, under Subdivision 3 of Section 50 of the Act, to secure our liability to pay the compensation provided in the Act, of the following securities, duly assigned to the Commission,

Date of issue.	Due date.	Interest dates.	Numbers.	Bonds of—	Par value.
April 16, 1914	March 1, 1964	....			
"	"	....	82	City of N. Y.	$100,000
"	"	....	110		100,000
		....	111		100,000

such securities being of the aggregate par value of Three Hundred Thousand ($300,000) dollars, and the aggregate market value being in excess of par value.

Such securities are deposited with the Commission with power to hold and dispose of the same strictly in accordance with the provisions and for the purposes provided in the Workmen's Compensation Act, and not otherwise. The interest collected by the Commission upon securities deposited by us under subdivision 3 of Section 50, so long as they are held by the Commission, will be turned over to and belong to the undersigned unless required to be used for some purpose provided by the Act.

2. That we will, and hereby do, make a deposit of Thirty Thousand ($30,000) dollars in cash with the Commission under Section 25 of the Act, to secure the prompt and convenient payment
89 of all compensation for which we may become liable, with full power and authority to the Commission to apply the same or whatever portion thereof may be lawfully required, upon not less than three days' written notice to us, to the payment of all compensation for which we become liable under the award or awards of the Commission, and we do hereby further agree and bind ourselves to make good our said cash deposit immediately.

3. That we whenever required by the Commission so to do, will upon five days' written notice from the Commission, pay an amount equal to the present value of the future payments of compensation under any award made by the Commission against us, into the State Insurance Fund, to be held by it and disposed of in accordance with the terms of Section 27 of said Act or any other provision of said act.

4. That if at any time the Commission shall in its discretion require additional proof of our continuing ability to pay compensation without insuring the same, or a larger deposit of securities or of cash than is herewith tendered, we agree, within ten days after the mailing of notice to us at our last given post office Address, to supply proof satisfactory to the Commission or to make and maintain such larger deposit, failing which proof or deposit this privilege to pay compensation without insuring we consent that be revoked.

The foregoing deposits and promises are hereby tendered to the Commission as fulfillment on our part of the conditions precedent, named in their grant to us of the privilege of paying compensation.

Signed at New York, N. Y., this 21st day of July, 1914.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

(Sgd.) A. H. SMITH.

Witness:

(Sgd.) W. J. ALGER.

90 *Employer's Form for Agreement to Make and Maintain a Cash Deposit under Section 25 of the Workmen's Compensation Act.*

We, the New York Central & Hudson River Railroad Company, an employer engaged in the business of transportation by railroad, with headquarters at New York, N. Y., to whom Privilege No. 157 to carry our own risk has been granted, herewith make, and hereby promise to maintain while such Privilege remains in force and until all obligations incurred by us during such period under the Workmen's Compensation Act of New York shall have been discharged, a cash deposit with the State Workmen's Compensation Commission of the Amount of Thirty Thousand Dollars ($30,000.00) to secure the prompt and convenient payment of compensation awarded by such Commission to be paid by us; and, to enable the purpose for which this deposit is made, to be fully and effectively carried out, we hereby authorize the State Workmen's Compensation Commission to pay out of such deposit any and every sum which such Commission may find due and payable by us under any award, reserving the right of contest or appeal provided by the terms of the Workmen's Compensation Act. The exercise of this discretion shall not render the Commission or any Commissioner or other employee of the Commission liable for any moneys so paid out, unless otherwise provided by the law of this State.

The interest received by the Commission on such deposit is to be credited to the account of the undersigned.

We further promise and agree to maintain such deposit,
91 by replacing all amounts so paid out immediately upon receipt of written notice.

Signed at New York, N. Y., this 21st day of July, 1914.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
(Sgd.) By A. H. SMITH.

Witness:
(Sgd.) W. J. ALGER.

Stipulation.

Pursuant to the provisions of Section 3301 of the Code of Civil Procedure, it is hereby

Stipulated and Agreed by and between the Attorney General of the State of New York, the counsel for the State Workmen's Compensation Commission, and the attorneys for the employer, being all of the attorneys who have appeared in the foregoing action or proceeding brought to have determined a claim under the State Employers' Liability Act, that the preceding printed copies, except the following:

Notice of hearing, form C-28

Proof of death, affidavit of wife, form C-24
Proof of death by undertaker, form C-21
Proof of death by clergyman, form C-22

constitute and include all of the records including pleadings, proceedings and evidence of every nature which were before the State Workmen's Compensation Commission at the time of the consideration and rendering of its decision and award, and also the notice of appeal to the Appellate Division, the order of affirmance of the Appellate Division, order of affirmance of the Compensation Commission,
92 correspondence between the State Workmen's Compensation Commission and the employer requesting leave to be relieved from the operations of the Compensation Act, and further making application to become a self insurer; also the notice of appeal to the Court of Appeals, and are true copies of each of, and the whole of, the respective originals thereof, now on file and of record in the office of the State Workmen's Compensation Commission; and it is further

Stipulated, that the said papers and the record need not be certified and that the foregoing is stipulated as the record, certification hereby being waived.

Dated, June —, 1915.

EGBURT E. WOODBURY,
Attorney General of the State of New York.
JEREMIAH F. CONNOR,
Attorney for State Workmen's Compensation Commission.
VISSCHER, WHALEN & AUSTIN,
Attorneys for N. Y. C. & H. R. R. Co., Employer.

93 *Affidavit of No Opinion.*

In the Court of Appeals of the State of New York.

In the Matter of the Claim of SARAH WHITE for Compensation Arising Out of the Death of Jacob White
against
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Employer.

STATE OF NEW YORK,
City and County of Albany, ss:

William L. Visscher, being duly sworn, deposes and says that he is one of the attorneys for the appellant in the above entitled action; that no opinion herein was delivered by the Appellate Division, Third Judicial Department, before whom the appeal herein from the award and order in favor of claimant was argued.

WILLIAM L. VISSCHER.

Subscribed and sworn to before me this 2nd day of June, 1915.
EDNA M. SAGER,
Notary Public, Albany County, N. Y.

94 10-8-15-250 (39-10388). Form 6.

Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 19th day of October, in the year of our Lord one thousand nine hundred and fifteen, before the Judges of said Court.

Witness, The Hon. Willard Bartlett, Chief Judge, presiding, R. M. Barber, Clerk.

Remittitur October 20th, 1915.

In the Matter of the Claim of SARAH WHITE for Compensation, etc., Respondent,
ag'st
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Be it remembered, that on the 2nd day of July, in the year of our Lord one thousand nine hundred and fifteen, The New York Central and Hudson River Railroad Company the appellant in this proceeding, came here into the Court of Appeals, by Visscher, Whalen & Austin, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department.

And State Workmen's Compensation Commission, the respondent in said proceeding afterwards appeared in said Court of
95 Appeals by Egburt E. Woodbury, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. William L. Visscher of counsel for the appellant, and by Mr. Harold J. Hinman, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the — of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according

to law, and which record now remains in the said Appellate Division, before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

96 Court of Appeals, Clerk's Office.

ALBANY, October 20, 1915.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein, attached thereto.

[L. S.] R. M. BARBER, *Clerk.*

97 At a term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held at *at* the Court House, City of Albany, N. Y., on the 9th day of November, 1915.

Present:

Hon. Walter Lloyd Smith,
Presiding Justice.

Hon. John M. Kellogg,
Hon. George F. Lyon,
Hon. Wesley O. Howard,
Hon. John Woodward,
Associate Justices.

In the Matter of the Claim of SARAH WHITE for Compensation Arising Out of the Death of Jacob White, Claimant-Respondent,
against
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Employer-Appellant.

The above named New York Central & Hudson River Railroad Company having appealed from the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, made at a Term commencing on the 4th day of May, 1915, which affirmed an award of the Workmen's Compensation Commission entered in the office of said Commission on the 20th day of October, 1914, whereby compensation was awarded to the above named Sarah White at the rate of $3.03 weekly during her widowhood, together with the sum of One Hundred ($100) Dollars funeral expenses paid by her; and said appeal having been argued in the Court of Appeals by William L. Fisher, Esq., counsel for the appellant, and Harold J. Hinman, Deputy Attorney General, of counsel for the State Industrial Commission, formerly the Workmen's Compensation Commission, and the Court of Appeals, after due deliberation

had thereon, did order and adjudge that the order of the
98 Appellate Division of the Supreme Court appealed from be affirmed with costs, and further ordered that the record and proceedings be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law, and the said remittitur having been filed in this Court,

Now, on motion of E. E. Woodbury, Attorney General, *General* for the State Industrial Commission, formerly the Workmen's Compensation Commission, it is

Ordered that the order and judgment of the Court of Appeals be and the same is hereby made the order of this Court, and that the award or decision of the Workmen's Compensation Commission entered on the 20th day of October, 1914, be and the same is hereby in all respects affirmed with $118.35 costs to be paid by the appellant.

JOSEPH H. HOLLANDS, *Clerk.*

A copy.

[L. S.] JOSEPH H. HOLLANDS, *Clerk.*

99 [Endorsed:] Supreme Court, App. Div., Third Dept. In the Matter of the Claim of Sarah White for compensation, etc., Claimant-Respondent, against New York Central & Hudson River Railroad Company, Employer-Appellant. Copy. Order Affirming Order. Egburt E. Woodbury, Attorney-General, Attorney for Respt., Capitol, Albany, N. Y.

100 Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of the Claim of Sarah White for Compensation Arising Out of the Death of Jacob White, Claimant, Respondent,

against

The New York Central and Hudson River Railroad Company, Employer, Appellant.

It is hereby stipulated by and between the attorneys for the respective parties hereto, pursuant to rule 8 of the Supreme Court of the United States, that the following portions of the record shall constitute the transcript of record on writ of error from the Supreme Court of the United States, and that the Clerk shall transmit to the Clerk of the Supreme Court of the United States only the papers herein designated as follows:

Statement under Rule 41 of the General Rules of Practice,
Notice of Appeal to Court of Appeals,
Notice of Death to Commission,
Notice of Death to Employer by Defendant,
Notice of Death to Employer by Commission,
Claim for Compensation,
Employer's First Report of Injury,
Affidavit of Death by Eye Witness,

Proof of Death by Employer,
Notice of Death to Insurance Carrier,
Notice of Hearing,
Minutes,
Affidavit of Fowler Breevort,
101 Affidavit of Fred Weaver,
Affidavit of Garrett H. Wilson,
Objections to Award by Employer,
Employer's Proposed Decision,
Decision and Award,
Employer's Exceptions,
Opinion of Commission,
Employer's Notice of Appeal to Appellate Division,
Stipulation as to papers in Appellate Division,
Order of Chairman to File with Appellate Division,
Order Settling and Filing Case,
Order of Affirmance by the Appellate Division,
Order of Affirmance State Workmen's Compensation Commission,
Correspondence between State Workmen's Compensation Commission and Employer requesting leave to be relieved from operation of Compensation Act,
Stipulation as to papers in Court of Appeals,
Affidavit of no Opinion in Appellate Division,
Judgment of the Court of Appeals,
Order of Appellate Division entered on judgment of Court of Appeals.
Dated, December 9th, 1915.

VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.
EGBURT E. WOODBURY,
Attorney General, Attorney for Industrial Commission and Respondent.

102 [Endorsed:] Original. Supreme Court, Appellate Division, Third Judicial Department. In the Matter of the Claim of Sarah White, &c., Claimant, Respondent, against New York Central and Hudson River Railroad Company, employer, Appellant. Stipulation Pursuant to Rule 8 of the U. S. Supreme Court. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address 19 Tweddle Building, Albany, N. Y.

103 Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of the Claim of SARAH WHITE for Compensation Arising Out of the Death of Jacob White, Claimant-Respondent, against NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Employer-Appellant.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Sarah White, claimant-respondent, against New York Central & Hudson River Railroad Company, employer-appellant, as set forth in the annexed stipulation, bearing date December 9th, 1915, and made pursuant to Rule 8 of the Supreme Court of the United States between the attorneys for the respective parties hereto, and also of the opinion rendered herein, as the same now appear on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at my office in the City of Albany, State of New York, this 11th day of December, 1915.

[Seal Supreme Court, Appellate Division, Third Department.]

[L. S.] JOSEPH H. HOLLANDS,
Clerk of the Appellate Division,
Supreme Court, Third Department.

104 [Endorsed:] Original. Supreme Court, Appellate Division, Third Judicial Department. In the Matter of the Claim of Sarah White, &c., Claimant, Respondent, against New York Central and Hudson River Railroad Company, Employer, Appellant. Authentication of Record. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address 19 Tweddle Building, Albany, N. Y.

105 Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of the Claim of SARAH WHITE for Compensation Arising Out of the Death of Jacob White, Claimant-Respondent,
against
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Employer-Appellant.

UNITED STATES OF AMERICA,
State of New York,
Third Judicial Department, ss:

In obedience to the commands of the writ of error herein allowed December 6th, 1915, I herewith transmit to the Supreme Court of the United States a duly certified transcript of such portions of the record and proceedings in the above entitled cause, as, in pursuance of Rule 8 of the Supreme Court of the United States, the attorneys for the respective parties hereto have by stipulation designated, with all things concerning the same.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Albany, State of New York, this 11th day of December, 1915.

[Seal Supreme Court, Appellate Division, Third Department.]

[L. S.] JOSEPH H. HOLLANDS,
Clerk of the Appellate Division,
Supreme Court, Third Department.

106 [Endorsed:] Original. Supreme Court, Appellate Division, Third Judicial Department. In the Matter of the Claim of Sarah White, &c., claimant, Respondent, against New York Central and Hudson River Railroad Company, Employer, Appellant. Return to Writ of Error. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address 19 Tweddle Building, Albany, N. Y.

107 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error,
against
SARAH WHITE, Defendant-in-Error.

Prayer for Reversal.

To the Supreme Court of the United States:

Comes now The New York Central Railroad Company, plaintiff in error, and prays for a reversal of the order of the Supreme Court of the State of New York herein entered in the office of the Clerk of the Appellate Division thereof, in the Third Judicial Department of

said state, on the 9th day of November, 1915, affirming a decision and award of the Workmen's Compensation Commission of said state, a reversal of which is likewise prayed, entered on the 20th day of October, 1914; and plaintiff in error further prays for a reversal of a judgment of the Court of Appeals of said state, rendered on the 19th day of October, 1915, upon which said order hereinbefore first mentioned was entered.

And your petitioner will ever pray.

Dated, December 3rd, 1915.

H. LEROY AUSTIN,
Of Counsel for the New York Central Railroad Company.

108 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error,
against
SARAH WHITE, Defendant-in-Error.

Petition for Writ of Error.

To the Supreme Court of the United States and to the Honorable Justices thereof:

The petition of The New York Central Railroad Company, a corporation organized and incorporated by agreement of consolidation bearing date April 29, 1914, and recorded in the office of the Secretary of State of the State of New York December 22, 1914, between several railroad corporations, among others, The New York Central and Hudson River Railroad Company (hereinafter designated as said railroad company), and to whose rights and liabilities your petitioner, by virtue of the statutes of the State of New York in such case made and provided, has succeeded, respectfully shows:

First. On or about the 28th day of September, 1914, the above named Sarah White commenced before the State Workmen's Compensation Commission of the State of New York a special proceeding against said railroad company and therein alleged:

(*a.*) That one Jacob White, husband of said Sarah White, at about 7:08 P. M. on the 2nd day of September, 1914, while employed as a night watchman by said railroad company, near its station at White Plains, in the County of Westchester, State of New York, was struck by said railroad company's south bound train No. 464, thereby sustaining injuries which forthwith caused the death of said Jacob White, who left him surviving said Sarah White,
109 as his widow, dependent upon him for support, but no minor children. In said proceeding no negligence or other fault on the part of any one, in connection with said injury to said Sarah White, was alleged, or proved or found.

(*b.*) That by reason of the death of said Jacob White, said Sarah White had become entitled to be awarded by said Workmen's Compensation Commission compensation, payable by said railroad company, in accordance with the provisions of chapter 41 of the Laws

of 1914 of the State of New York, commonly known as the Workmen's Compensation Law.

Second. In said proceeding before said Commission said railroad company appeared and alleged that said Jacob White, when he met his death, was employed by said railroad company, which was then engaging as a common carrier by rail, in commerce between the States of New York and Massachusetts, to wit, in the work of constructing a new station at said White Plains and of laying new main tracks, used by said railroad company as instrumentalities of such commerce, namely, in connection with the operation of trains, carrying both passengers and freight, from points in the State of New York to points in the State of Massachusetts.

Third. Said railroad company contended in said proceeding before said Commission:

(*a.*) That said Sarah White was not entitled to recover from said railroad company compensation for said death of said Jacob White, under the provisions of said Workmen's Compensation Law, because the liability, if any, of said railroad company for said death was defined and limited exclusively by the provisions of the Act of Congress entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases. Approved April 22, 1908", as amended April 5, 1910, and commonly known as the Federal Employers' Liability Act.

110 (*b.*) That to award to said Sarah White compensation for said death of said Jacob White, under the provisions of said Workmen's Compensation Law, would deprive said railroad company of its property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

(*c.*) That to award to said Sarah White compensation for said death of said James Winfield, under the provisions of said Workmen's Compensation Law, would deny to said railroad company the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Fourth. After hearing the allegations and proofs of the parties, said Workmen's Compensation Commission rendered its written decision and award, which was entered October 20, 1914, wherein said Commission found and decided that said Jacob White, at about 7:08 P. M. on September 2nd, 1914, while employed as a watchman by said railroad company, to guard tools and materials in use by said railroad company at White Plains in the construction of a new station and new tracks, was struck by a south bound train and thereby sustained injuries which caused his death; that the injuries so sustained by said Jacob White were accidental, and arose out of and in the course of his employment; and that said Sarah White was entitled to receive, and she was thereby awarded, for funeral expenses of said deceased the sum of one hundred dollars, and for compensation, the sum of three dollars and three cents ($3.03) per week throughout her widowhood, which said sums for funeral expenses and compensation said railroad company was required to pay to said Sarah White by the terms of said Workmen's Compensation Law.

Said Commission also overruled all and singular the three contentions of said railroad company specified in paragraph third of this petition.

111 Fifth. From said decision and award of said Compensation Commission said railroad company duly appealed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, where, upon the argument of said appeal which duly came on to be heard, said railroad company, through its counsel, duly urged, among other things, against the validity of said decision and award of said compensation Commission all and singular the contentions hereinbefore specified in paragraph third of this petition, but said Appellate Division of the Supreme Court overruled each of the contentions aforesaid and, by an order bearing date May 4, 1915, and entered in the office of the Clerk of said Appellate Division on the 7th day of May, 1915, said Appellate Division affirmed said decision and award of said Compensation Commission entered on the 20th day of October, 1914.

Sixth. From said order of said Appellate Division said railroad company duly appealed to the Court of Appeals of the State of New York, which was and is the highest court of the State of New York in which could be had a decision of the questions so raised by said contentions of said railroad company and hereinbefore specified in paragraph third of this petition, and which contentions, among other things, said railroad company through its counsel duly urged upon the argument of said appeal to the Court of Appeals of the State of New York which duly came on to be heard. But said Court of Appeals of the State of New York overruled each of the contentions of said railroad company and, by its judgment rendered October 19th, 1915, said Court of Appeals affirmed said order of said Appellate Division of the Supreme Court, to which said Court of Appeals sent down its remittitur, consisting of a copy of the said judgment of said Court of Appeals and of the papers upon which said

112 Court of Appeals made its said judgment, and said remittitur was filed on the 9th day of November, 1915, in the office of the Clerk of said Appellate Division where said remittitur now remains of record. Upon said remittitur an order was entered on the 9th day of November, 1915, in the office of the Clerk of said Appellate Division, whereby the said judgment of the Court of Appeals herein became the order of said Appellate Division, and the sum of One hundred eighteen dollars and thirty-five Cents ($118.35), costs of said appeal to the said Court of Appeals, was awarded against said railroad company.

Seventh. Under and by virtue of the provisions of chapter 674 of the Laws of 1915, effective May 22, 1915, of the State of New York, said Workmen's Compensation Commission was abolished, and the duties and functions thereof, as prescribed by said chapter 41 of the Laws of 1914, were devolved upon the State Industrial Commission, which is composed of John Mitchell, Louis Wiard, William H. H. Rogers, Edward P. Lyon and James M. Lynch who, as such Industrial Commission, appeared by the Attorney General of the State of New York in said Court of Appeals in support of the

validity of said order of the said Appellate Division thus brought up for review by said appeal to said Court of Appeals.

Wherefore your petitioner prays that a writ of error may be allowed and issued, directed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, commanding said Appellate Division to send to the Supreme Court of the United States the record of all and singular the record and papers in said special proceeding and for citation and supersedeas to stay execution, to the end that the errors of which your petitioner complains herein and in the assignment of errors herein filed may be reviewed and, if errors be found, corrected conformably to the constitution and laws of the
113 United States.

And your petitioner will ever pray.

Dated, December 3rd 1915.

THE NEW YORK CENTRAL RAILROAD COMPANY,
By H. LEROY AUSTIN, *Counsel.*

STATE OF NEW YORK,
City and County of Albany, ss:

Robert E. Whalen, being duly sworn, deposes and says that he is the regularly retained counsel for the petitioner, The New York Central Railroad Company, in this proceeding. That he has read the foregoing petition, the contents whereof he knows to be true. That the reason why this verification is made by deponent is that said petitioner is a corporation, none of whose officers resides or is within the County of Albany, State of New York, where deponent resides and has his place of business.

ROBERT E. WHALEN.

Subscribed and sworn to before me this 3rd day of December, 1915.

[Seal Edna M. Sager, Notary Public, Albany County, N. Y.]

EDNA M. SAGER,
Notary Public, Albany County, N. Y.

114 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error,
against
SARAH WHITE, Defendant-in-Error.

Comes now The New York Central Railroad Company, plaintiff in error, and makes and files this its assignment of errors:

1. The Court of Appeals of the State of New York, in affirming, by its judgment herein rendered October 19th, 1915, the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, entered May 7th,

1915, erred, as did also said Appellate Division and the State Workmen's Compensation Commission of the State of New York, in overruling the contention of the New York Central and Hudson River Railroad Company that its liability, if any, to Sarah White, for the death of said Jacob White, for which she has sought compensation in this proceeding, is defined and limited, exclusively, by the provisions of the Act of Congress, entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases. Approved April 22, 1908", as amended April 5, 1910, and commonly known as the Federal Employers' Liability Act, and in holding that said Federal Employers' Liability Act does not define and limit, exclusively, the liability, if any, of the New York Central and Hudson River Railroad Company to said Sarah White for the said death of said Jacob White.

2. The Court of Appeals of the State of New York, in affirming, by its judgment herein rendered October 19, 1915, the
115 order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, entered May 7th, 1915, erred, as did also said Appellate Division and the State Workmen's Compensation Commission of the State of New York, in overruling the contention of the New York Central and Hudson River Railroad Company that to award to the above named Sarah White compensation in this proceeding, under the provisions of chapter 41 of the Laws of 1914 of the State of New York, commonly known as the Workmen's Compensation Law, would deprive the New York Central and Hudson River Railroad Company of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

3. The Court of Appeals of the State of New York, in affirming, by its judgment herein rendered October 19th, 1915, the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, entered May 7th, 1915, erred, as did also said Appellate Division and the State Workmen's Compensation Commission of the State of New York, in overruling the contention of the New York Central and Hudson River Railroad Company that to award to the above named Sarah White compensation in this proceeding, under the provisions of chapter 41 of the Laws of 1914 of the State of New York, commonly known as the Workmen's Compensation Law, would deny to the New York Central and Hudson River Railroad Company the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Dated, December 3rd, 1915.

H. LEROY AUSTIN,
Of Counsel for the New York Central Railroad Company.

116 [Endorsed:] Original. Supreme Court of the United States. The New York Central Railroad Company, Plaintiff-in-Error, against Sarah White, Defendant-in-Error. Prayer for Reversal, Petition for Writ of Error and Assignment of Errors. Visscher, Whalen & Austin, Attorneys for Plaintiff-in-Error. Office and Post-Office Address, 19 Tweddle Building, Albany, N. Y.

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York, and to the Honorable Justices thereof, Greeting:

Because in the record and proceedings, as also in the rendition of the order, of a plea which is in the said Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York, before you, or some of you, upon a judgment of the Court of Appeals of the State of New York, being the highest court of law or equity of the said state in which a decision could be had, in the suit or special proceeding between Sarah White and The New York Central and Hudson River Railroad Company, wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaty or laws of the United States, and the decision was in favor of their validity; and wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The New York Central and Hudson River Railroad Company, as appears by the complaint of the New York Central Railroad Company, as the successor to the rights and liabilities of the New York Central and Hudson River Railroad Company: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under
118 your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 3rd day of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable Edward Douglass White, Chief Justice of the United States, the 6th day of December in the year of our Lord one thousand nine hundred and fifteen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

119 [Endorsed:] Original. Supreme Court of the United States. The New York Central Railroad Company, Plaintiff-in-Error, against Sarah White, Defendant-in-Error. Writ of Error. Visscher, Whalen & Austin, Attorneys for Plaintiff-in-Error, Office and Post-Office Address, 19 Tweddle Building, Albany, N. Y.

120 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error,
against
SARAH WHITE, Defendant-in-Error.

STATE OF NEW YORK,
County of Westchester,
City of Yonkers, ss:

John A. Wallace, being duly sworn, deposes and says that he is of the age of twenty-one years *of age*, a citizen of the United States of America, and a resident of the City of Yonkers, New York. That on the 10th day of December, 1915, at 36 Caroline Avenue, in the City of Yonkers, State of New York, he served the annexed citation upon Sarah White by delivering to and leaving with her a true copy thereof, and at the same time exhibiting to her the original signature of the Hon. Charles E. Hughes, Associate Justice of the Supreme Court of the United States, and that he knew the said person so served to be the one described in the annexed citation as the said Sarah White.

JOHN A. WALLACE.

Subscribed and Sworn to before me this 10th day of December, 1915.

[Seal William A. Feuchs, Notary Public, Westchester County, N. Y.]

WM. A. FEUCHS,
Notary Public, Westchester County.

121 UNITED STATES OF AMERICA, *ss:*

To Sarah White and John Mitchell, Louis Wiard, William H. H. Rogers, Edward P. Lyon, and James M. Lynch, as and composing the State Industrial Commission of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error directed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, wherein The New York Central Railroad Company is plaintiff in error and Sarah White, above named, is defendant in error, to show cause, if any there

be, why the judgment and order rendered against The New York Central and Hudson River Railroad Company, as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this 6th day of December in the year of our Lord one Thousand Nine Hundred and Fifteen.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

122 [Endorsed:] Original. Supreme Court of the United States. The New York Central Railroad Company, Plaintiff-in-Error, against Sarah White, Defendant-in-Error. Citation. Visscher, Whalen & Austin, Attorneys for Plaintiff-in-Error, Office and Post-Office Address, 19 Tweddle Building, Albany, N. Y. Due and personal service of a copy of the within Citation is admitted this 9th day of December 1915. Egburt E. Woodbury, Attorneys General and Attorney for State Industrial Commission and Respondent.

123 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,
against
SARAH WHITE, Defendant in Error.

Know all men by these presents, that The National Surety Company of New York, a corporation organized and existing under and by virtue of the Laws of the State of New York, and having its principal place of business at 115 Broadway, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto Sarah White in the sum of Two thousand Dollars, lawful money of the United States, to be paid to said Sarah White, her executors, administrators and assigns, for which payment, well and truly to be made, said The National Surety Company of New York binds itself, its successors and assigns, jointly and severally firmly by these presents.

Sealed with the seal of said The National Surety Company of New York and dated this 3rd day of December, 1915.

Whereas the above named The New York Central Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York entered on the 9th day of November, 1915, affirming a decision and award of the Workmen's Compensation Commission of said state, a reversal of which is likewise sought, as well as, also, a reversal of judgment in the Court of Appeals of said state, rendered on the 19th day of October, 1915, upon which said order hereinbefore first mentioned was entered,

124 Now, therefore, the condition of this obligation is such that if the above named The New York Central Railroad

Company shall prosecute its said writ of error to effect and, if it fail to make its plea good; shall answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and virtue.

THE NATIONAL SURETY COMPANY
OF NEW YORK,
By BORDEN H. MILLS,
Res. Vice-President.

Attest:
T. FRANCIS GRAHAM,
Res. Assistant Secretary.

Approved this 6th day of December, 1915, to act as a supersedeas.

[SEAL.] CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

125 STATE OF NEW YORK,
County of Albany, ss:

On this 3rd day of December, 1915, before me personally appeared Borden H. Mills, Resident Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of Albany; that he is the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like authority, and that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement filed with the Superintendent of Insurance of the State of New York and certified to by said Superintendent, pursuant to section 2 of chapter 182 of the Laws of the State of New York for the year 1913, amending section 182 of chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York. And said Borden H. Mills further said that he is acquainted with T. Francis Graham and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said T. Francis Graham subscribed to the said instrument is in the genuine handwriting of the said T. Francis Graham and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Resident Vice-President.

[L. S.] CHAS. H. MILLS,
Notary Public, Albany Co., N. Y.

126 National Surety Company of New York.

Financial Statement, December 31st, 1914.

Wm. B. Joyce, President; Hubert J. Hewitt, Secretary.

Assets.

Cash in Banks and Offices	$830,566.89
Government, Municipal and Other Bonds, and Stocks	5,432,304.10
Real Estate, Mortgages and Collateral Loans	140,880.88
Unpaid Premiums (excluding Premiums 90 days overdue)	583,102.87
Accrued Interest and Accounts Receivable	449,820.26
Total	$7,436,675.00

Liabilities.

Unearned Premium Reserve	$1,915,193.77
Reserve for Contingent Claims (Less Reinsurance)	1,204,387.65
Contingent Reserve for Loss Expense	67,813.56
Anticipated Taxes (due 1915) and Unpaid Commissions (not due)	188,825.60
Accounts Payable (not due)	98,499.16
Dividend Declared (Paid Jan. 2nd, 1915)	60,000.00
Capital Stock	2,000,000.00
Reserve Fund	401,955.26
Surplus	†1,500,000.00
Total	$7,436,675.00

† In computing this surplus no deduction is made on account of so called "special" deposits made under the laws of the various states, etc., the net amount being $25,424.95.

STATE OF NEW YORK,
County of New York, ss:

Wm. I. Hawks, being duly sworn, says: That he is Assistant Secretary of the National Surety Company that said Company is a Corporation duly organized, existing, and engaged in business as a Surety by virtue of the Laws of the State of New York, and has duly complied with all the requirements of the Laws of said State and of the Laws of the State of New York applicable to said company, and is duly qualified to act as Surety under such Laws; that said Company has also complied with and is duly qualified to act as Surety under the Act of August 13, 1894, entitled "An Act Relative to Recognizances, Stipulations, Bonds and Undertakings, and To Allow Certain Corporations To be Accepted As Surety Thereon," as amended by the Act of Congress of March 23, 1910. That the foregoing is a

full, true and correct statement of the financial condition of said Company on the 31st day of December, 1914.

WM. I. HAWKS.

Sworn to before me this 1st day of February, 1915.

[SEAL.] WM. M. WEAVER,
Notary Public for New York County, No. 4020.

Certificate filed in Kings, Nassau, Queens, Bronx, Richmond, and Westchester Counties.

New York County Register's Office No. 6006.
Kings County Register's Office No. 6000.
Bronx County Register's Office No. 619.
My commission expires March 30, 1916.

127 [Endorsed:] Copy. Supreme Court of the United States. The New York Central Railroad Company, Plaintiff in Error, against Sarah White, Defendant in Error. Bond. Visscher, Whalen & Austin, Attorneys for Plaintiff in Error, Office and Post-Office Address 19 Tweddle Building, Albany, N. Y.

128 Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of the Claim of SARAH WHITE for Compensation Arising Out of the Death of Jacob White, Claimant-Respondent, against
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Employer-Appellant.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of said Court, do hereby certify that there have been lodged with me, as such clerk, this day, in the above entitled cause:

1. The original bond, of which a copy is hereto annexed.
2. Two copies of the writ of error as herein set forth, one for the defendant in error above, and one to file in my office.
3. One copy of the petition, assignment of error and prayer for reversal herein.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Albany, State of New York, this 11th day of December, 1915.

[Seal Supreme Court, Appellate Division, Third Department.]

[L. S.] JOSEPH H. HOLLANDS,
Clerk of the Appellate Division,
Supreme Court, Third Department.

129 [Endorsed:] Original Supreme Court, Appellate Division, Third Judicial Department. In the Matter of the Claim of Sarah

White, &c., Claimants, Respondent, against New York Central and Hudson River Railroad Company, Employer, Appellant. Certificate of Lodgment. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address 19 Tweddle Building, Albany, N. Y. Due and personal service of a copy of the within —— is admitted this — day of ——, 191–. —— ——, Attorneys for —— ——.

Endorsed on cover: File No. 25,044. New York Supreme Court, Appellate Division, Third Judicial Department. Term No. 761. The New York Central & Hudson River Railroad Company, plaintiff in error, vs. Sarah White. Filed December 15th, 1915. File No. 25,044.

FILED
DEC 18 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 764 320

THE NEW YORK CENTRAL RAILROAD COMPANY

Plaintiff-in-Error

against

SARAH WHITE

Defendant-in-Error

No. 765 321

THE NEW YORK CENTRAL RAILROAD COMPANY

Plaintiff-in-Error

against

JAMES WINFIELD

Defendant-in-Error

MOTION TO ADVANCE

H. LEROY AUSTIN

Attorney for Plaintiff-in-Error

ROBERT E. WHALEN

Of Counsel

SUPREME COURT OF THE UNITED STATES.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error, *against* SARAH WHITE, Defendant-in-Error.	OCTOBER TERM, 1915. No. 761.
THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error, *against* JAMES WINFIELD, Defendant-in-Error.	OCTOBER TERM, 1915. No. 762.

On writs of error to the Appellate Division of the Supreme Court, Third Department, State of New York.

MOTION TO ADVANCE.

Now comes the plaintiff-in-error and respectfully moves the court to advance these causes for hearing during the present term, preferably, if convenient to the court, on the 21st day of February, 1916.

STATEMENT.

These causes come here by writs of error to review decisions of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, each rendered upon a judgment of the Court

of Appeals of said State. They have been argued together in the respective appellate courts of the State of New York, present similar questions, and involve (a) the constitutionality of the Workmen's Compensation Law of the State of New York, and (b) the applicability of said law in cases where a railroad employee, otherwise within the provisions of the Federal Employers' Liability Act, is injured or killed *without negligence*.

In the White case, one Jacob White, in the employ of the New York Central and Hudson River Railroad Company, was accidentally killed while at work as a night watchman in connection with the construction of buildings and tracks used by the railroad as instrumentalities of interstate commerce.

In the Winfield case, defendant-in-error, while tamping ties under tracks over which the New York Central and Hudson River Railroad Company ran interstate trains, lost the sight of an eye which was struck by a stone that bounded up from the ballast between the ties.

Before the State Workmen's Compensation Commission, in the Appellate Division and in the Court of Appeals the employer urged that the Workmen's Compensation Law, if applied in these cases, would deprive the employer of its property without due process of law, would deny to it the equal protection of the laws, and would conflict with paramount provisions of the Federal Employers' Liability Act. All of such contentions have been overruled below, and in the Winfield case the Court of Appeals has held, in an opinion by Judge Seabury, that, where no charge of negligence is involved, compensation, as prescribed by said Workmen's Compensation Law, is payable for disability or death, resulting from accidental personal injuries, and that the Federal mployers' Liability Act is without application.

REASONS FOR ADVANCEMENT.

I.

The same reasons obtain in these cases as moved this court recently to advance the cases of Southern Pacific Company v. Jensen (No. 700) and Clyde Steamship Company v. Walker (No. 701), which have been set for argument on February 21st, 1916.

II.

So far as the constitutional questions above mentioned are concerned, they are identical with those which are presented in the cases of Jensen and Walker above mentioned.

III.

A very large number of cases are pending wherein awards for compensation have been made for disability or death resulting from personal injuries sustained while an employee was concededly employed by the railroad, which was then engaging, in interstate commerce, but wherein no charge of negligence was involved. In each such instance appeals have been taken, the ultimate disposition of which must be governed by the decision of this court in these causes, pending which payment of the awards thus made has been stayed.

H. LEROY AUSTIN,
Attorney for Plaintiff-in-Error.

ROBERT E. WHALEN,
Of Counsel.

Dated December 16th, 1915.

We concur in this motion.

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Attorney General of the State of New York.

BRINNIER & CANFIELD,
Attorneys for Defendant-in-Error Winfield.

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Brief for Plaintiff-in-Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 761.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-Error,
against
SARAH WHITE,
Defendant-in-Error.

In error to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York.

Statement of the Case.

This case involves:

(a). The constitutionality under the Fourteenth Amendment of chapter 41 of the Laws of 1914 of the State of New York, a compulsory "Workmen's Compensation Law;"

(b). The applicability of said Workmen's Compensation Law where a railroad employee, while claimed to have been employed in interstate commerce by the railroad engaging in interstate commerce, within the provisions of the Federal Employers' Liability Act, is killed without negligence.

A copy of said Workmen's Compensation Law, marked Appendix "A," is annexed to this brief.

This proceeding was commenced by defendant-in-error before the State Workmen's Compensation Commission of the State of New York, a commission established by said law and superseded by the State Industrial Commission, to recover under said Compensation Law for the death of her husband, Jacob White, who was killed while employed as a night watchman by the predecessor in interest of the plaintiff-in-error, but in said proceeding negligence, as a cause of such death, was neither alleged, nor proven nor found.

To the rendition of any award of compensation the railroad company interposed before the commission the following objections:

(a). That the liability, if any, of the railroad company for the death of Jacob White, who, when he met his death was employed in interstate commerce by the railroad, which also was then engaging in commerce between the States of New York and Massachusetts, was defined and limited exclusively by the provisions of the Federal Employers' Liability Act;

(b). That to award compensation for the death of Jacob White, under the provisions of said Workmen's Compensation Law, would deprive the railroad company of its property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Federal Constitution;

(c). That to award such compensation would deny to the railroad company the equal protection of the laws, in contravention of the provisions of

the Fourteenth Amendment to the Federal Constitution.

After hearing witnesses and receiving affidavits, the commission, in an opinion which is printed at pp. 37-39 of the Transcript, held that Jacob White, when he met his death, was not employed by the railroad in interstate commerce, and rendered its decision and award of compensation accordingly (Transcript, pp. 30-32), to which, as well as to the refusal of the commission to make findings in accordance with the railroad's requests (Transcript, pp. 27-30), the railroad filed exceptions. (Transcript, pp. 32-36.)

The award made by the commission was affirmed, without opinion, on appeal therefrom taken to the Appellate Division of the Supreme Court, in the Third Judicial Department (Transcript, pp. 41-52), whose order of affirmance was in turn affirmed, without opinion, on appeal therefrom taken by the railroad to the Court of Appeals, whose judgment was remitted to the Appellate Division, to which the New York Central Railroad Company, as successor in title and in interest to the New York Central and Hudson River Railroad Company, has prosecuted a writ of error from this court. (Transcript, pp. 53-55, 64.)

Specification of Errors.

Plaintiff-in-error contends:

1. That the Court of Appeals, as also the Appellate Division and the Workmen's Compensation Commission, erred in not holding that the liability, if any, of the railroad for the death of Jacob White is defined and limited, exclusively, by the provisions of the Federal Employers' Liability Act.

2. That the Court of Appeals, as also the Appellate Division and the Workmen's Compensation Commission, erred in not holding that to award to

defendant-in-error compensation for the death of Jacob White, under the provisions of the Workmen's Compensation Law, would deprive the railroad of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

3. That the Court of Appeals, as also the Appellate Division and the Workmen's Compensation Commission, erred in not holding that to award to defendant-in-error compensation for the death of Jacob White, under the provisions of the Workmen's Compensation Law, would deny to the railroad the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Argument.

Statement of Facts.

At White Plains, New York, on September 2, 1914, the railroad maintained two main line tracks, extending generally north and south, with what is called an island platform between them. (Transcript, pp. 3, 31.) To the east of the tracks, over which the railroad operated both intrastate and interstate trains, stood the railroad station, used for the arrival and departure of both interstate and intrastate passengers, baggage and freight. (Transcript, pp. 21-22, 31.)

Some two hundred feet to the west of the tracks the railroad was constructing a new station, as well as new main tracks, all, when completed, to supersede the station and tracks then in use. (Transcript, pp. 12, 13, 15, 16, 26, 31.)

On the evening in question Jacob White, employed by the railroad as a night watchman upon the construction work, reported for duty at 6.30 o'clock to his foreman, by whom White was directed to patrol and watch the site of the construction

work, and to keep a lookout, against trespassers and pilferers, over the materials, tools, cars and machinery which were upon the ground in connection with the work of construction. (Transcript, pp. 9, 12, 13, 21, 30.) None of the property committed to White's care lay east of a bill board fence, 900 feet long, which extended west of and substantially parallel with the westerly main track then in use, and there was nothing in connection with his duties as watchman which appears to have required the presence of White east of the bill board fence. (Transcript, pp. 12, 13, 17, 18, 20, 31.) At about 7.00 p. m., after conversation with his fellow servant, Mullarkey, concerning his duties, White proceeded in a westerly direction toward the new track, passing from Mullarkey's view. (Transcript, p. 16.)

A minute or two later the body of White was found some fifteen feet north of the southerly terminus of the island platform, near the westerly or south-bound main track, where he had been struck and killed by a south-bound train, not, however, because of any negligence alleged, or proven or found. (Transcript, pp. 9, 16-17, 22, 23, 31.) White's body, which lay east of the south-bound track, was some fifty feet south of the southerly end of the bill board fence, and between the point where his body was found and the location of the new construction work intervened a temporary side track, on which stood a string of seven cars containing tools and material. (Transcript, pp. 23, 31.)

POINT I.

The State Workmen's Compensation Commission was without power to make the award under review.

1. *White, when killed, was employed in interstate commerce by the railroad, which also was then engaging in interstate commerce.*

(a). It must be conceded that this court has expressly left open for determination, when squarely presented, the question whether construction of an uncompleted instrumentality, designed for use, when finished, in interstate commerce, brings a railroad and its employee upon such work within the provisions of the Federal Act.

Pedersen v. D. L. & W. R. R., 229 U. S., 146, 152.

(b). Two of the lower Federal Courts have resolved the question in the negative.

Jackson v. Chic. M. & St. P. Ry., 210 Fed., 495, 498.
Bravis v. Chic. M. & St. P. Ry., 217 Fed., 234, 236.

(c). "Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

N. Y. C. R. R. v. Carr, 238 U. S., 260, 263-264.

(d). "The true test of employment in such commerce in the sense intended is, was the employe at

the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

Shanks v. D. L. & W. (U. S. Sup. Ct., Jan. 10, 1916).

(e). To each of the following cases the nature of the work of the employee, when injured or killed, has been held to render the Federal Act applicable:

A locomotive fireman walking to the place where he was to go on duty.

Lamphere v. Oregon R. & N. Co., 196 Fed., 336 (Cited by this court in the Pedersen case).

A section hand riding to his camp at night after work.

San Pedro R. Co. v. Davide, 210 Fed., 870.

An employee engaged in building a new office in an old freight shed.

Eng v. Southern Pacific Co., 210 Fed., 92.

An employee engaged in installing a block system to be used in signalling trains.

Grow v. Oregon Short Line Co., 138 Pac., 398.

A section hand asleep at night in a car on a side track.

Sanders v. C. & W. C. Ry. Co., 81 S. E., 283.

An engineer at a station for pumping water to be used by engines engaged in interstate commerce.

Horton v. O. R. & N. Co., 72 Wash., 503.

An employee assisting in the movement of water or coal to be consumed by engines used in interstate commerce.

Barker v. K. C. M. & O. Ry. Co., 43 L. R. A. (N. S.), 1121.

2. *Hence, the Federal Employers' Liability Act alone measures the claimant's right to recover.*

POINT II.

Absence of any element of negligence in this case does not render operative the provisions of the State Workmen's Compensation Act.

POINT III.

The State Workmen's Compensation Act itself precludes an award in this case.

To avoid repetition of the argument in support of subdivision 2 of Point I, and to sustain Point II and Point III, this court is respectfully referred to the discussion, at length, under the correspondingly numbered points at pages 11, 15 and 34 of the brief filed by this plaintiff-in-error in New York Central R. R. Co. v. James Winfield (No. 762), argued herewith.

POINT IV.

The State Workmen's Compensation Act, which is compulsory in its terms, contravenes the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

This discussion will be addressed to five topics:

1. The revolutionary character of a compulsory compensation act.

2 Absence of fault as an element of liability.

3. The economic considerations involved.

4. The decision in Ives v. South Buffalo Ry. Co. (201 N. Y., 271).

5. The exercise of the police power as an asserted justification for a compulsory compensation act.

1. *The New York Workmen's Compensation Law is revolutionary in its character.*

That the Act is, beyond all question, compulsory in its terms must clearly appear from the following summary of certain sections thereof, all of which are printed at length in Appendix "A" hereto annexed:

Section 2 prescribes payment of compensation for injuries sustained or death incurred by employees engaged in any of forty-two groups of employment, which are declared by the Act to be hazardous.

Section 10 imposes upon every employer within the so-called hazardous groups liability to pay or

provide compensation, according to schedules set forth in section 15 of the Act, for disability or death of his employee, resulting from an accidental personal injury arising out of and in the course of the employment, "*without regard to fault as a cause of such injury,*" save where the injury is due to an employee's willful intent, or results solely from his intoxication.

Section 11 renders the liability prescribed by section 10 exclusive, except where the employer has failed to secure payment of compensation under the Act, in which event those who are entitled to compensation may elect to claim such compensation or to sue at law for damages resulting from the injury. Should such an action be brought, freedom from contributory negligence need be neither pleaded nor proven, and defendant is deprived of the familiar defenses of negligence of a fellow servant, assumption of risks, and contributory negligence.

Section 13 exacts from the employer "such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or requested by the employee, during sixty days after the injury," in default whereof the employee is empowered to pledge the credit of his employer therefor, the schedule of expenses in that connection to be regulated by the commission created to administer the provisions of the Act.

Section 20 accords finality to the decision of the commission of any question of fact.

Section 21 prescribes, "in the absence of substantial evidence to the contrary," that all claims presented for compensation under the Act shall be presumed to come within its provisions.

Section 26 clothes the commission with power to recover, as liquidated damages, in an action in the name of the people of the State, any award of compensation not paid within ten days after it becomes due, and such recovery may include an added penalty of fifty per cent.

Section 32 invalidates any agreement by an employee to waive his right to compensation under the Act.

Section 50, under pain of a penalty therein prescribed, requires each employer to secure payment of compensation to his employees by (a) insurance in a State compensation fund created by the Act, or (b) insurance in a stock corporation or mutual association authorized to write insurance, or (c) upon satisfactory proof of his financial responsibility, deposit with the commission of securities sufficient to meet any liability for compensation under the Act.

Section 52, as a penalty for failure thus to secure payment of compensation, authorizes the maintenance of an action at law for damages under section 11 of the Act.

Section 60, as the Act was originally enacted, created a State Workmen's Compensation Commission of five members, as an administrative and quasi-judicial board, clothed with power to pass upon all matters arising under the Act. By chapter 674 of the Laws of 1915, however, effective May 22, 1915, section 60 was repealed, the State Workmen's Compensation Commission was abolished, and the powers, duties and functions thereof, as prescribed by the Workmen's Compensation Law, were conferred and imposed upon a State Industrial Commission of five members.

That the Act is compulsory, the New York Court of Appeals has very recently declared.

Matter of Post, New York Law Journal, Jan. 24, 1916.

Legislation which imposes compulsory compensation without regard to fault is subversive of fundamental principles of our American jurisprudence. Sanction thereof in Great Britain and in continental Europe, where written constitutional guaranties do not prevail, is valueless as precedent for the valid enactment of such laws under a government whose legislative powers are subject to the limitations of a written constitution. The Teutonic empires of Central Europe were pioneers in enactments of this class. Germany in 1884 and Austria in 1887 were among the earliest to pass such laws. Of the utmost significance is it that in those two countries the theories of Socialism have attained their furthest practical development. There, to a much greater degree than elsewhere among the powerful nations of the earth, paternalism has circumscribed the activities of the individual until the whole body politic, outside the governing classes, stands upon substantially the same level. And that level has been established not by the elevation of the indolent, inefficient and dependent, but by keeping down the enterprising, capable and self-sustaining. Indeed, social legislation, so called, is one of the few instances where *Kultur* has gained a foothold upon our Anglo-Saxon law. Nor is its influence any the less real because of the fact that its advance has been made gradually and peaceably rather than with force and arms.

No state in this country passed a workmen's compensation law until more than a decade after the enactment of the first English compensation act in 1897 (60 and 61 Vict., Ch. 37), which was at first confined to cases of personal injury or death. In 1906, however, the English act was extended to include compensation for occupational diseases, an innovation which was embodied in the proposed new Constitution which the people of the State of New York in 1915 rejected by an overwhelming vote. Still later Lloyd-George advocated

the further extension of the English act so as to provide, as in Germany, for compulsory payment of old-age pensions to those who become superannuated in private service.

Of the unprecedented character among our American institutions of a statute which prescribes compulsory compensation, regardless of fault, Judge Werner thus wrote, in pronouncing unconstitutional the New York Act of 1910, chapter 674:

> "The statute, judged by our common law standards, is plainly revolutionary. * * * The radical character of this legislation is at once revealed by contrasting it with the rule of the common law."
>
> Ives v. South Buffalo Ry. Co., 201 N. Y., 271, 285.

After characterizing the act as a "departure from our long established law and usage" (p. 286), Judge Werner continued:

> "We are unlike any of the countries whose industrial laws are referred to as models for our guidance. Practically all of these countries are so-called constitutional monarchies in which, as in England, there is no written constitution, and the Parliament or law making body is supreme." (Id., p. 287.)
>
> "There is, of course, in this country no direct legal authority upon the subject of the liability sought to be imposed by this statute, for the theory is not merely new in our system of jurisprudence, but plainly antagonistic to its basic idea. The English authorities are of no assistance to us, because in the king's courts the decrees of the Parliament are the supreme law of the land, although they are interesting in their disclosures of the paternalism which logically results from a universal employers' liability based solely upon the relation of em-

ployer and employee, and not upon fault in the employer." (Id., p. 296.)

Adverting to the dictum of the commission, under whose auspices the New York Act of 1910 had been prepared, that it merely reversed certain rules of the common law, Judge Werner observed that the Act

> "does not stop at reversing the common law; it attempts to reverse the very provisions of the Constitution which, the commissioners admit, are obviously beyond the reach of the legislature." (Id., p. 304.)

In sustaining the constitutionality of a compulsory compensation act in California, it was conceded in the prevailing opinion of the Supreme Court of that state that "the change thus made is radical, not to say revolutionary."

Western Indemnity Co. v. Pillsbury,
151 Pac., 398, 401.

Such legislation is merely the entering wedge for the introduction of a vast and comprehensive scheme of socialistic laws, passed under the guise of regulating the relation of master and servant in industry, but which have in effect as their primary object the taking of the master's property for the benefit of the servant. Certain it is that laws which compel payment of compensation for occupational diseases, or sickness, or old age, or lack of employment are clearly and solely for the benefit of the servant at the expense of the master. Once let the constitutionality of such legislation be established, and it will be equally competent to enact legislation whereby all employers, irrespective of any question of fault, shall be liable in an unliquidated amount for all damages which their employees may sustain while engaged in their work. "Compensation" cannot be distinguished in substance from

"damages," since the only difference between them is that for the former the rate of payment is fixed and certain.

Thus it is that a system of compulsory compensation, regardless of fault, necessarily runs counter to all conceptions of liberty and of property rights hitherto recognized in America. So, too, its advent inevitably marks a relaxation from the self imposed restraints which the majority has prescribed as a safeguard against its own acts of oppression of the minority.

It will be borne in mind that the Ohio Compensation Act of 1911 (since superseded by a compulsory Act passed in 1913) was declared by this court to be voluntary or elective in its terms, Mr. Justice Day observing: "No employer is obliged to go into this plan. He may stay out of it altogether if he will."

Jeffrey Mfg. Co. v. Blagg, 235 U. S., 571, 577.

2. *Absence of fault as an element of liability.*

The Act does not purport to regulate any industry within the state; or to impose upon an employer any duty in regard to the place where, or the character of the machinery, plant, tools or appliance with which, or the promulgation of rules or regulations for safety under which, employees shall work. Neither does it assume to prescribe health provisions. No plan is presented to guard against the occurrence of personal injury or death, but, on the contrary, relaxation of care on the part of a workman, to avoid harm to himself, is actually encouraged by the scheme of the statute. On the other hand, once the employer has paid into the State fund the required amount of premiums, which under the law are certain and are fixed without regard to *care* on his part, of what pecuniary concern is it thenceforth to the employer

whether one or ten of his employees be thereafter injured or killed? Although it has often been argued that the enactment of compulsory compensation laws must result in an incentive on the part of the employer, because of the burden placed upon him, to protect his workman from accident, it is yet to be urged seriously that the existence of such laws upon the statute books will tend to stimulate the workman to care on his part.

The liability which the statute imposes upon the employer depends upon no ground hitherto recognized in American jurisprudence as a basis of responsibility. It rests neither upon breach of contract nor upon omission to perform any duty prescribed by common or statute law. The liability exists even though the employer be wholly free from negligence, even though he has been guilty of no legal or ethical wrong, even though he has exercised the utmost diligence to guard against the occurrence of an accident which could not have been anticipated, and even though an employee may not only injure himself, through his own fault, but also cause injury or death to fellow employees for which the employer must pay compensation, and entail, furthermore, a large monetary loss to the employer through damage to property.

Neither time, nor place, nor circumstance, of an accident has any bearing upon the employer's liability to secure compensation under the Act. It is all a matter of consequences to the employee or his dependents. For the consequences to the employer he must himself look out, since the state will not.

It was upon that feature of the New York Act, chapter 674 of the Laws of 1910, which imposed liability upon an employer, whether at fault or not, that the Court of Appeals dwelt with emphasis in the Ives case:

> "This rule of liability, stated in another form, is that the employer is responsible to the

employee for every accident in the course of the employment, whether the employer is at fault or not, and whether the employee is at fault or not, except when the fault of the employee is so grave as to constitute serious and willful misconduct on his part" (p. 285).

"One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law, except as to the employers enumerated in the new statute. * * * It is conceded that this is a liability unknown to the common law and we think it plainly constitutes a deprivation of liberty and property under the Federal and State Constitutions, unless its imposition can be justified under the police power which will be discussed under a separate head" (pp. 293-4).

"It authorizes the taking of the employer's property without his consent and without his fault" (p. 298).

"Its sole purpose is to make him liable for injuries which may be sustained wholly without his fault, and solely through the fault of the employee, except where the latter fault is such as to constitute serious and willful misconduct" (p. 302).

3. *The economic considerations involved.*

The economic considerations upon which such legislation is based are nothing else than socialistic. Not only is the wholly innocent employer arbitrarily compelled to provide compensation for the consequences of an accident, avoidable by the employee or inevitable on the part of the employer, but the Act even prescribes the amount of the em-

ployer's money which shall be devoted to the compensation of the workman or his dependents. Paul is to be paid at all events out of the pocket of Peter. It is the familiar instance, which Professor Sumner used to denounce, of a resolution adopted by A and B that C shall have something done for him, not by themselves, but by D. In other words, the employer is the Forgotten Man whose rights, Sumner declared, are always overlooked in every ill-conceived plan of social amelioration. Whether the workman be young or old, temperate or intemperate, industrious or shiftless, efficient or wasteful, prudent or reckless, faultless or blameworthy, let accident but befall him and the statutory scheme of compensation is automatically set in motion. If a workman meet death, wholly through his own fault, in the early morning of the first day of his employment, the employer thenceforth must secure compensation to the workman's dependents, extending, in the case of a widow, throughout her life or widowhood.

There is no limit beyond which compulsory compensation laws, if constitutional, may not be extended. Instead of half wages to an injured employee double wages may as competently be prescribed; or $100.00 per month, as readily as $20.00, may be fixed as the compulsory allowance to a widow. Such legislation is plainly an attempt to relieve society at large from the care of those who are unable to support themselves, and to impose the obligation upon private industry to provide for the relief of a portion of the community, for causes which are only a part of those which bring about dependence upon care at the hands of society.

Advocates of compulsory compensation, irrespective of fault, seek to justify it as shifting the burden of misfortune from those who are least, to those who are more, able to bear it. If that be sufficient reason to sustain the constitutionality

of such legislation, as against the assertion that it violates the guaranty of due process of law, then why limit its operation to accidents which arise out of and in the course of the workman's employment? His situation, or that of his dependents should he die, is not more easily endured if a casualty befall him during an interval of leisure, or when he is otherwise off duty. Grant the validity of legislation of this character, and it becomes at once apparent that the law making power has fallen far short of securing adequate provision for the needy. The principle may, with equal competency, be extended so as to enforce payment of compensation at the hands of one upon whose property a workman, visiting during hours of recreation, meets with an accident due to no one's fault. Just as properly may compensation be exacted from a municipality upon whose streets the workman, while off duty, is struck by lightning or murdered. Thus again it is clear that the principle which underlies compulsory compensation is the appropriation, for the benefit of one class in the community, of money which belongs to another.

But it is the favorite answer of those who would uphold such legislation, that, in the long run, the burden thus transferred from the less to the more prosperous will be distributed, as part of the cost of production, among the consuming public. Let it be assumed, without at all conceding, that so long as ultimate reimbursement is secured to him, one man's property may be taken from him for the private needs of another. Yet, even though practical experience should bear out the theory in manufacturing and mercantile industries, is there any adequate reason to suppose, in view of the history of rate legislation and litigation during the last decade, that those engaged in transportation will be able to secure, through increased rates, reimbursement for the vast outlay entailed upon

them by compliance with compulsory compensation laws?

There is no reason, however, why employees should not be required to provide out of their wages against possible consequences of disability or death which may come to them through accident. Hazards of the employment are elements which go to make up a scale of wages. Railroads notoriously pay higher wages than are paid in other employments, since the supposed risks of railroad service are greater, a consideration constantly put forward with every new demand on the part of railroad men for an advance in wages. It follows, therefore, that compulsory compensation acts are simply professed devices to increase indirectly the cost of operation to the employer, while in fact they result either in an increase of wages or in a continuance of wages, in whole or in part, without the necessity of rendering service therefor.

Of the economic theories advanced as a justification for such legislation, theories which in the year following the decision in the Ives case were expounded by eminent authority under the guise of a so-called social and industrial justice, the New York Court of Appeals in the Ives case disposed as follows:

> "Under our form of government, however, courts must regard all economic, philosophical and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be moulded into statutes without infringing upon the letter or spirit of our written constitutions" (p. 287).
>
> "The right of property rests not upon philosophical or scientific speculations nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fun-

damental law. That can be changed by the people, but not by legislatures. In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. Law as used in this sense means the basic law and not the very act of legislation which deprives the citizen of his rights, privileges or property. Any other view would lead to the absurdity that the Constitutions protect only those rights which the legislatures do not take away. If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guarantees of the Constitution are a mere waste of words" (pp. 294-5).

4. *The decision in Ives v. South Buffalo Ry. Co.* (201 N. Y., 271).

That legislation of the character involved in the case at bar contravenes the due process clause of the Fourteenth Amendment was distinctly and repeatedly pointed out in the Ives case by the New York Court of Appeals, which held that the New York Statute of 1910 there under review was violative not only of the State, but also of the Federal, Constitution. Said Judge Werner (italics ours):

> "In our country the *Federal* and State Constitutions are the charters which demark the extent and the limitations of legislative power" (p. 287).
>
> "We turn now to the *two* objections which we regard as fatal to its validity" (p. 292).
>
> "It is conceded that this is a liability unknown to the common law and we think it

plainly constitutes a deprivation of liberty and property under the *Federal* and State Constitutions" (p. 294).

"We conclude, therefore, that in its basic and vital features the right given to the employee by this statute does not preserve to the employer the 'due process' of law guaranteed by the *Constitutions*" (p. 298).

It must be conceded that the decision of the New York Court of Appeals in the Ives case was the stimulating impulse to the propagation of the doctrine of recall of judges, which was soon tempered, in a measure, so as to aim rather at securing by popular vote a review of judicial decisions. However far the exponents of such methods of coercion of the judiciary may have progressed in certain sections of this country, it is sufficient to say that their views have found no place in our organic Federal law.

As freely must it be conceded that the New York Court of Appeals, despite its decision in the Ives case, sustained in July last the constitutionality, under the Fourteenth Amendment, of a compulsory compensation act passed after the Constitution of the State of New York had been amended by adding to article I thereof section 19 (effective January 1, 1914, and printed in Appendix "B" hereof), in an avowed attempt to circumvent the constitutional objections which had been held fatal to the validity of the earlier act of 1910.

Matter of Jensen v. Southern Pacific Co., 215 N. Y., 514.

Now, it is self-evident that insuperable objections, based upon the due process clause of the Fourteenth Amendment, interposed to the principle of compulsory compensation regardless of fault, cannot be brushed away by mere amendment of the constitution of a state. If the reason

ing of the court in the Ives case was sound, it is equally unanswerable to-day.

Subdivision 2 of Article 6 of the Constitution of the United States provides as follows:

"This Constitution * * * shall be the supreme law of the land * * * anything in the Constitution or laws of any State to the contrary notwithstanding."

Hence it is perfectly obvious that the amendment made in 1913 to the Constitution of the State of New York, to permit the enactment of such a statute as is here under consideration, has failed to meet the constitutional objections, stated in the Ives case, that such enactments contravene the due process clause of the Fourteenth Amendment to the Federal Constitution.

But in the *Jensen* case the conclusion reached was made to rest upon (a) the decision of this court in Noble State Bank v. Haskell (219 U. S., 104), and (b) the circumstance that a compulsory scheme of *insurance* was involved, rather than a direct pecuniary liability with or without fault. Such, also, were the reasons assigned for the still more recent decision in California, where the *Jensen* case was followed.

Western Indemnity Co. v. Pillsbury,
151 Pac., 398, 404.

The same considerations, however, which had impelled the New York Court of Appeals to regard the Haskell case as inapt authority for sustaining the Act of 1910 in the *Ives* case, were equally applicable when the Act of 1914 was before it in the case of *Jensen*. And surely if the appropriation of a blameless man's property to the private necessities of another amounts to a denial of due process of law, it can gain no constitutional sanction by the mere expedient of causing the appropriation to take the guise of compulsory *insurance*.

So it comes to this, that Judge Werner's profoundly learned and masterly exposition of constitutional limitations in the Ives case, regardless of the contrary conclusion reached in the *Jensen* case, correctly states the principles which apply to the case at bar.

Essentially vicious and obnoxious to the equal protection clause of the Fourteenth Amendment is any compensatory scheme which depends, not upon fault or contract, but upon the status of the beneficiary. Take five men working together as carpenters for a large contracting concern: One of them, by dint of superiority in experience, thrift and skill, sets up in business for himself as a boss carpenter, taking with him as employees the other four. Let one of the four be injured through the sole negligence or other act of a third person, or through an agency entirely outside the control of the employer — forthwith a right to compensation, payment of which his new employer must secure, attaches. But let the new employer be the victim of any such casualty, and he or his dependents may look to no one for enforced compensation.

Again: suppose that one of the four decides to take a day off for rabbit shooting, and while thus disporting himself manages, with or without fault on his own part, to blow off the fingers of a hand. He, or his dependents if he die in consequence of blood poisoning, may be among those least able to bear the burden of the resulting incapacity or death, and yet, under no system of compensation, which has thus far been devised in this country, will his employer be mulcted. If, however, the workman, after spending his day of recreation without misfortune, reports for duty as usual on the following morning and, as a result of his own gross carelessness, thrusts his hand against a buzz-saw which takes off his fingers, or in picking up a pin from the floor runs it under his finger nail from which an

infection and death follow, for the consequent incapacity or resultant death compensation must be secured. These illustrations make it plain that the basis of the novel liability which this class of legislation imposes is not the relative ability or inability of the hapless to bear the burdens of their misfortunes. Rather is the basis found in the capacity of D to comply, under coercion, with what A and B have resolved that he, though blameless, shall do for C.

In the Ives case, while the point was made that the statute then under review denied the employer not only his constitutional guaranty of due process of law, but also excluded the employer from the equal protection of the laws, the court did not pass upon the latter contention, since its decision of the former point sufficed to abrogate the statute.

In the case of Middleton v. Texas Power and Light Company (178 S. W., 956), the Texas Court of Civil Appeals had under consideration a statute of the State of Texas, passed in 1913, in which the scheme for an employer's liability for compensation provided that the employer might elect whether to insure under the statute, or to stand upon his common law liability, in which latter event, however, he would be precluded from asserting the familiar common law defenses. But the statute further provided that, should the employer elect to insure thereunder, the employee must pursue his remedy under the act, and should maintain no action at common law. The court held that such provision was unconstitutional, as denying to the employee not only due process of law, but the equal protection of the laws, as guaranteed to him by *both* the *Federal* and Texas constitutions, the court saying:

> "Our reason for holding that the provision of the statute referred to is unconstitutional is based upon the fact that it leaves it op-

tional as to the employer, and makes it compulsory as to the employee when the employer has elected to avail himself of the benefits of the statute. The Federal Constitution declares that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; * * * Undoubtedly, the statute here involved is optional as to the employer; he has his choice and may or may not become a subscriber, pay premiums, obtain insurance for the benefit of his employees, and thereby release himself from what would otherwise be his liability to such employees. It is true that if he does not pursue that course he loses some of his common-law defenses; but the fact remains that he has an option and may choose between two laws concerning himself and his employees and fixing their respective rights.

"We think it is also quite clear that the statute is compulsory as to the employee and allows him no choice as to whether he will accepts its terms, or claim his rights as they formerly existed according to the common law. This being the case, we think it is clear that this statute, in so far as it undertakes, without his consent, to deprive an employee of his common-law right of action at the option of his employer, is violative of the constitutional provisions above referred to. True, it is in theory if not in fact, that every man has the privilege of declining to accept employment from any particular person or corporation; but if he pursues that course and remains out of the employment of any employer who has accepted the terms and provisions of this statute, then he has not exercised any option as an employee. He has merely declined to become an employee.

In several of the States which have legislated upon the subject it has been *left optional with both employer and employee,* and if the employer chooses to accept the terms of the law, his employee, without giving up his employment, may decline to accept under the statute and retain his common-law right of action against his employer. In some of the other States the law is compulsory as to both employer and employee. The Texas statute declares, in express terms, that when an employer has complied with its provisions, neither the employee nor his legal representatives shall have any right of action against him for injuries to such employee; and it makes no provision whereby the employee can exercise his option and either accept or reject that provision of the statute. In other words, the statute presents to the employer two laws, differing widely and radically concerning his liability to his employee, and permits him to choose, without the consent of his employee, which of those two laws shall fix the rights of his employee as against him. If he selects one of those laws, his employee can maintain an action against him, and recover damages for personal injuries caused by his negligence, according to the common law as it existed before this statute was enacted; while if he selects the other law, by which a limited amount of compensation is to be paid to the injured employee by an insurance company, he, the employer, is relieved from liability, and an employee injured by his negligence can maintain no cause of action against him. * * * We are not unmindful of the rule, supported by all the authorities, that legislation may be based upon reasonable classification; and when so done, and no discrimination is made among different members of a class, such legis-

lation is not obnoxious to Federal and State constitutions. But the rule and decisions referred to do not go to the extent of holding that, without doing anything to lessen the risk and hazards of the employment, an employer, without the consent of his employee, may, at his own option, substitute the liability of another for his own liability to the employee, and thereby release himself from all liability. Therefore it is no answer to say that the Texas statute affords equal rights, privileges and protection to the employers as one class, and the employees as another class, who come within the purview of its provisions. * * *"

Logically all *voluntary* compensation acts permit the employer to elect under what law his relations with his employees shall be governed. Of necessity, therefore, whenever he determines not to come under the provisions of a voluntary elective act, his employees have no choice but to abide by the provisions of the common law.

The constitutionality of a State compulsory Workmen's Compensation Law under the Fourteenth Amendment is a question which this court has not, so far as we are advised, been called upon to determine. In *Northern Pacific Railway Company* v. *Meese* (No. 133, October Term, 191, decided January 7, 1916), this court had to decide whether the understanding of the junior Federal Courts (United States District Court for the Western District of Washington, 206 Fed., 222, and United States Circuit Court of Appeals for the Ninth Circuit, 211 Fed., 254) of the interpretation of one provision of the Washington compulsory Workmen's Compensation Act by the Supreme Court of the State of Washington was correct. The District Court held that the act had repealed the remedy for death by wrongful act, as between servants injured at the plant of the master and third persons.

The Circuit Court of Appeals reversed this holding. This court thereupon examined the decision of the Supreme Court of the State of Washington in Peet v. Mills (76 Wash., 437), and found that the District Court had rightly understood and interpreted the decision of the Supreme Court of the State of Washington. Accordingly, this court reversed the Circuit Court of Appeals and reinstated the decision of the District Court, because, as was said by Mr. Justice McReynolds:

> "It is settled doctrine that Federal Courts must accept the construction of a State statute deliberately adopted by its highest court."

The State of Washington having created the remedy unknown to common law for death by wrongful act could repeal that remedy. This court was not called upon to decide and carefully refrained from deciding any constitutional question except the one described later in Mr. Justice McReynolds' opinion as follows:

> "Respondents' suggestion that the construction of the act adopted by the trial court would cause it to conflict with the equal protection clause of the Fourteenth Amendment, is without merit. They have raised no other question involving application of the Federal Constitution."

The decision of the District Court which was reinstated by the judgment of this court had also declared that those phases of the act which compelled contribution from one person or employee to be used in paying for the negligence of another "is not now before the Court." No question as to due process, either for the employer or for the employee, was suggested, argued or determined in that case.

5. *The exercise of the police power as an asserted justification for a compulsory Compensation Act.*

That the passage of the Act is an attempted exercise of the police power has been asserted in its behalf.

> "But its exercise is justified only when it appears that the interests of the public generally, *as distinguished from those of a particular class,* require it, and when the means used are reasonably necessary for the accomplishment of the desired end, and are not unduly oppressive. * * * In order to sustain legislation under the police power the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare. If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the courts to declare it invalid, for legislative assumption of the right to direct the channel into which the private energies of the citizen may flow, or legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government." [Italics ours.]
>
> Ives v. South Buffalo Ry. Co., 201 N. Y., 271, 301.

> "When an industry or calling is *per se* lawful and open to all, and, therefore, beyond the prohibitive power of the legislature, the right of governmental control must be confined to such reasonable enactments as are directly designed

to conserve health, safety, comfort, morals, peace and order. (Lochner v. New York, 198 U. S., 45.) For the failure of an employer to observe such regulations the legislature may unquestionably enact direct penalties or create presumptions of fault which, if not rebutted by proof, may be regarded as sufficient evidence of liability for damages. That must be the extreme limit of the police power, for just beyond is the Constitution which, in substance and effect, forbids that a citizen shall be penalized or subjected to liability unless he has violated some law or has been guilty of some fault." (Id., p. 305.)

Many cases, wherein the constitutional limitations of the police power are discussed, were examined by the New York Court of Appeals in the Ives case, including, among others, the following cases decided by this court:

Camfield v. U. S., 167 U. S., 518 (at p. 319).

Chic., R. I. & P. Ry. v. Zernecke, 183 U. S., 582 (at p. 310).

Noble State Bank v. Haskell, 219 U. S., 104 (at pp. 315, 319).

St. Louis & San F. Ry. v. Mathews, 165 U. S., 1 (at p. 313).

The Osceola, 189 U. S., 158 (at p. 311).

But the conclusion reached was that, without crossing constitutional bounds authoritatively marked by judicial decisions, a compulsory compensation act, irrespective of fault, cannot be sustained as a valid exercise of the police power.

Such conclusion, moreover, is sustained not alone by the construction so uniformly placed upon the provisions of written constitutions, but also as the

recognition of an inherent right which it is beyond the power of any legislative body to invade.

> "The bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void."
>
> Cooley, Const. Lim. (6th Ed.), p. 208.

In support of the principle thus enunciated, Judge Cooley quotes the following observations of Justice Nelson:

> "It is now considered an universal and fundamental proposition in every well regulated and properly administered government, whether embodied in a constitutional form or not, that private property cannot be taken for strictly private purposes at all, nor for public without a just compensation; and that the obligation of contracts cannot be abrogated or essentially impaired. These and other vested rights of the citizen are held sacred and inviolable, even against the plentitude of power of the legislative department."
>
> People v. Morris, 13 Wend., 325, 328.

If it be sound theory that the industry should bear the burden of all that train of losses which naturally, and often inevitably, follow as a result of the manufacture or use of an article, then it would seem that an unreasonable limit has been set by confining compulsory compensation to employees alone. Why should not a railroad, with equal competency, be required to compensate travelers on highways, licensees and even trespassers for their injuries, or their families if they die? Since society is supposed now to sustain the burden of accidents which arise out of railroad

operation, why should not the railroads as justly be compelled to take over such burden, not merely in the cases of employees, but also where injury to or death of passengers, shippers or trespassers results? Especially would such an extension of liability be justifiable as a claimed exercise of the police power, on the theory that liability to respond in compulsory compensation for accidents to persons of all classes, including even trespassers, would tend to promote the exercise of care on the part of railroad operatives to avoid the occurrence of such casualties.

The far reaching consequences of a compulsory compensation act upon an employer of labor on a large scale may be readily appreciated from the following figures. Calculating at only $1,500 each annual payment, by way of wages, in excess of $1,500, the total payroll for the year upon the lines, wholly within the State of New York, now a part of the New York Central Railroad was according to the figures last available $49,198.145. The annual premium required to be paid into the State fund, calculated upon the basis prescribed by the Workmen's Compensation Commission of the State of New York, which is $14.85 per $100.00 of payroll, would be $7,305,924.53.

POINT V.

Plaintiff-in-error has not waived its right to test the application of the Compensation Act to this case.

1. *The right of plaintiff-in-error to raise the question has been expressly reserved.*

(a). Since the fact that plaintiff-in-error had become a "self insurer" under the provisions of the Workmen's Compensation Law was urged below as

a basis for a contention that the plaintiff-in-error has waived its right to question the application of the Compensation Act to this case, the plaintiff-in-error directs attention to the fact that its agreement made with the Compensation Commission, an agency of the state, for self-insurance, was therein expressly stated to be "without prejudice to our contention that we do not come within the provisions of the Workmen's Compensation Act, and reserving all contentions as to the invalidity of said Act or any part thereof." (Transcript, p. 37.)

(b). Also, in a letter bearing date July 1, 1914, from the president of the plaintiff-in-error to the Commission, it was specifically stated that the plan for self insurance by plaintiff-in-error would be "without prejudice to its contention that it does not come within the provisions of the Workmen's Compensation Law, and reserving all contentions as to the invalidity of said act or any part thereof." (Transcript, p. 36.)

2. *The cases invoked below do not sustain the contention.*

(a). In Musco v. United Surety Co. (196 N. Y., 459), cited in the state courts, the giving of the bond there in question was made a condition precedent to engagement in the line of business involved, so that a person had his choice either to furnish the bond or not to engage in that business. Furthermore, it was plainly pointed out therein (p. 464), deposits of money had been made with the principal upon the faith and credit of the bond which had been given, in consequence of which the principle of estoppel was very properly applied.

(b). Estes v. Bolles (150 U. S., 361), also cited below, involved the familiar doctrine of election between two inconsistent remedies, as appears at pp. 368-369 of the opinion.

3. *Pending an authoritative adjudication of the competency and scope of the Act, plaintiff-in-error had no choice but to comply with its insurance requirements.*

(a). In view of the deterrent nature of the excessive and drastic penalties prescribed by sections 26 and 52 of the Act for non-compliance with its terms, plaintiff-in-error is within the familiar rule that observance of the provisions of such Act, to avoid the risk of incurring its severe pains and penalties, does not preclude one who is aggrieved by the Act from testing its validity or application.

Ex Parte Young, 209 U. S., 123, 147.
Mo. Pac. Ry. Co. v. Nebraska, 217 U. S., 196, 207.
Mo. Pac. Ry. Co. v. Tucker, 230 U. S., 340, 349.
Wadley Southern Ry. v. Georgia, 235 U. S., 651, 662-665.

(b). In the words of Presiding Justice Smith's dissenting opinion when the Winfield case was in the Appellate Division, "the penalties for not filing a bond, if one be required, are so great as to make the filing of the same necessary for the protection of the appellant." (Winfield Transcript, p. 27.)

CONCLUSION.

Chapter 41 of the Laws of 1914, of the State of New York, under review, because of the compulsory provision thereof which requires an employer, regardless of fault on his part, to secure by insurance payment of compensation for injury to or death of an employee, takes the property of the employer for the private benefit of the employee or his dependents. Therefore, it deprives the employer of his property without due process of law and denies to him the equal protection of the laws,

in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States.

All of which is respectfully submitted.

Dated January 31, 1916.

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APPENDIX "A."

NEW YORK WORKMEN'S COMPENSATION LAW

[*Chapter* 816 *of the Laws of* 1913, *as re-enacted and amended by chapter* 41 *of the Laws of* 1914, *constituting chapter* 67 *of the Consolidated Laws, as amended by chapter* 316 *of the Laws of* 1914 *and by chapters* 167, 168, 615 *and* 674 *of the Laws of* 1915.]

Article 1. Short title, application, definitions (§§ 1-3).
2. Compensation (§§ 10-34).
3. Security for compensation (§§ 50-54).
4. State workmen's compensation commission (§§ 60-76).
5. State insurance fund (§§ 90-105).
6. Miscellaneous provisions (§§ 110-119).
7. Laws repealed; when to take effect (§§ 130-131).

ARTICLE 1

SHORT TITLE; APPLICATION; DEFINITIONS

Section 1. Short title.
2. Application.
3. Definitions.

Section 1. Short title.— This chapter shall be known as the "workmen's compensation law."

§ 2. Application.— Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:

Group 1. The operation, including construction and repair, of railways operated by steam, electric or other motive power, street railways, and incline railways, but not their construction when constructed by any person other than the company which owns or operates the railway, including

work of express, sleeping, parlor and dining car employees on railway trains.

Group 2. Construction and operation of railways not included in group one.

Group 3. The operation, including construction and repair, of car shops, machine shops, steam and power plants, and other works for the purposes of any such railway, or used or to be used in connection with it when operated, constructed or repaired by the company which owns or operates the railway.

Group 4. The operation, including construction and repair of car shops, machine shops, steam and power plants, not included in group three.

Group 5. The operation, including construction and repair, of telephone lines and wires for the purposes of the business of a telephone company, or used or to be used in connection with its business, when constructed or operated by the company.

Group 6. The operation, including construction and repair, of telegraph lines and wires for the purposes of the business of a telegraph company, or used or to be used in connection with its business, when constructed or operated by the company.

Group 7. Construction of telegraph and telephone lines not included in groups five and six.

Group 8. The operation, within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company.

Group 9. Shipbuilding, including construction and repair in a ship-yard or elsewhere, not included in group eight.

Group 10. Longshore work, including the loading or unloading of cargoes or parts of cargoes of

grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage.

Group 11. Dredging, subaqueous or caisson construction, and pile driving.

Group 12. Construction, installation or operation of electric light and electric power lines, dynamos, or appliances, and power transmission lines.

Group 13. Paving; sewer and subway construction, work under compressed air, excavation, tunneling and shaft sinking, well digging, laying and repair of underground pipes, cables and wires, not included in other groups.

Group 14. Lumbering; logging, river-driving, rafting, booming, saw mills, shingle mills, lath mills; manufacture of veneer and of excelsior; manufacture of staves, spokes, or headings.

Group 15. Pulp and paper mills.

Group 16. Manufacture of furniture, interior woodwork, organs, pianos, piano actions, canoes, small boats, coffins, wicker and rattan ware; upholstering; manufacture of mattresses or bed springs.

Group 17. Planing mills, sash and door factories, manufacture of wooden and corrugated paper boxes, cheese boxes, mouldings, window and door screens, window shades, carpet sweepers, wooden toys, articles and wares or baskets.

Group 18. Mining; reduction of ores and smelting; preparation of metals or minerals.

Group 19. Quarries; sand, shale, clay or gravel pits, lime kilns; manufacture of brick, tile, terra-cotta, fire-proofing, or paving blocks, manufacture of calcium carbide, cement, asphalt or paving material.

Group 20. Manufacture of glass, glass products, glassware, porcelain or pottery.

Group 21. Iron, steel or metal foundries; rolling mills; manufacture of castings, forgings, heavy engines, locomotives, machinery, safes, anchors, cables, rails, shafting, wires, tubing, pipes, sheet metal, boilers, furnaces, stoves, structural steel, iron or metal.

Group 22. Operation and repair of stationary engines and boilers, not included in other groups.

Group 23. Manufacture of small castings or forgings, metal wares, instruments, utensils and articles, hardware, nails, wire goods, screens, bolts, metal beds, sanitary, water, gas or electric fixtures, light machines, typewriters, cash registers, adding machines, carriage mountings, bicycles, metal toys, tools, cutlery, instruments, photographic cameras and supplies, sheet metal products, buttons.

Group 24. Manufacture of agricultural implements, threshing machines, traction engines, wagons, carriages, sleighs, vehicles, automobiles, motor trucks, toy wagons, sleighs or baby carriages.

Group 25. Manufacture of explosives and dangerous chemicals, corrosive acids or salts, ammonia, gasoline, petroleum, petroleum products, celluloid, gas, charcoal, artificial ice, gun powder or ammunition.

Group 26. Manufacture of paint, color, varnish, oil, japans, turpentine, printing ink, printers' rollers, tar, tarred, pitched or asphalted paper.

Group 27. Distilleries, breweries; manufacture of spirituous or malt liquors, alcohol, wine, mineral water or soda waters.

Group 28. Manufacture of drugs and chemicals, not specified in group twenty-five, medicines, dyes, extracts, pharmaceutical or toilet preparations, soaps, candles, perfumes, non-corrosive acids or

chemical preparations, fertilizers, including garbage disposal plants; shoe blacking or polish.

Group 29. Milling; manufacture of cereals or cattle foods, warehousing; storage; operation of grain elevators.

Group 30. Packing houses, abattoirs, manufacture or preparation of meats or meat products or glue.

Group 31. Tanneries.

Group 32. Manufacture of leather goods and products, belting, saddlery, harness, trunks, valises, boots, shoes, gloves, umbrellas, rubber goods, rubber shoes, tubing, tires or hose.

Group 33. Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries.

Group 34. Bakeries, including manufacture of crackers and biscuits, manufacture of confectionery, spices or condiments.

Group 35. Manufacture of tobacco, cigars, cigarettes or tobacco products.

Group 36. Manufacture of cordage, ropes, fibre, brooms or brushes; manilla or hemp products.

Group 37. Flax mills; manufacture of textiles or fabrics, spinning, weaving and knitting manufactories; manufacture of yarn, thread, hosiery, cloth, blankets, carpets, canvas, bags, shoddy or felt.

Group 38. Manufacture of men's or women's clothing, white wear, shirts, collars, corsets, hats, caps, furs or robes.

Group 39. Power laundries; dyeing, cleaning or bleaching.

Group 40. Printing, photo-engraving, stereotyping, electrotyping, lithographing, embossing; manufacture of stationery, paper, cardboard boxes, bags, or wall-paper; and book-binding.

Group 41. The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules.

Group 42. Stone cutting or dressing; marble works; manufacture of artificial stone; steel building and bridge construction; installation of elevators, fire escapes, boilers, engines or heavy machinery; brick-laying, tile-laying, mason work, stone-setting, concrete work, plastering; and manufacture of concrete blocks; structural carpentry; painting, decorating or renovating; sheet metal work; roofing; construction, repair and demolition of buildings and bridges; plumbing, sanitary or heating engineering; installation and covering of pipes or boilers.

§ 3. Definitions.— As used in this chapter, 1. "Hazardous employment" means a work or occupation described in section two of this chapter.

2. "Commission" means the state workmen's compensation commission, as constituted by this chapter.

3. "Employer," except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments including the state and a municipal corporation or other political subdivision thereof. [*Subd.* 3 *am'd by L.* 1914, *ch.* 316.]

4. "Employee" means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants.

5. "Employment" includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain.

6. "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

7. "Injury" and "personal injury" mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.

8. "Death" when mentioned as a basis for the right to compensation means only death resulting from such injury.

9. "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer.

10. "State fund" means the state insurance fund provided for in article five of this chapter.

11. "Child" shall include a posthumous child and a child legally adopted prior to the injury of the employee.

12. "Insurance carrier" shall include the state fund, stock corporations or mutual associations with which employers have insured, and employers permitted to pay compensation directly under the provisions of subdivision three of section fifty.

ARTICLE 2

Compensation

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§ 10. Liability for compensation.— Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty. Where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another,

or where the injury results solely from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent of such employee shall receive compensation under this chapter.

§ 11. Alternative remedy.— The liability prescribed by the last preceding section shall be exclusive, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. [*Section 11 am'd by L. 1914, ch. 316.*]

§ 12. Compensation not allowed for first two weeks.— No compensation shall be allowed for the first fourteen days of disability, except the benefits provided for in section thirteen of this chapter.

§ 13. Treatment and care of injured employees. — The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or be requested by the employee, during sixty days after the injury. If the employer fail to provide the same, the injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected

to do so. All fees and other charges for such treatment and services shall be subject to regulation by the commission as provided in section twenty-four of this chapter, and shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living.

§ 14. Weekly wages basis of compensation.—Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and shall be determined as follows:

1. If the injured employee shall have worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed;

2. If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed;

3. If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality,

shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident;

4. The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings;

5. If it be established that the injured employee was a minor when injured, and that under normal conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wages.

§ 15. Schedule in case of disability.— The following schedule of compensation is hereby established:

1. Total permanent disability. In case of total disability adjudged to be permanent sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

2. Temporary total disability. In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof, but not in excess of three thousand five hundred dollars, except as otherwise provided in this chapter.

3. Permanent partial disability. In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in the schedule as follows:

Thumb. For the loss of a thumb, sixty weeks.

First finger. For the loss of a first finger, commonly called index finger, forty-six weeks.

Second finger. For the loss of a second finger, thirty weeks.

Third finger. For the loss of a third finger, twenty-five weeks.

Fourth finger. For the loss of a fourth finger, commonly called the little finger, fifteen weeks.

Phalange of thumb or finger. The loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above specified. The loss of more than one phalange shall be considered as the loss of the entire thumb or finger; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

Great toe. For the loss of a great toe, thirty-eight weeks.

Other toes. For the loss of one of the toes other than the great toe, sixteen weeks.

Phalange of toe. The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of said toe, and the compensation shall be one-half of the amount specified. The loss of more than one phalange shall be considered as the loss of the entire toe.

Hand. The loss of a hand, two hundred and forty-four weeks.

Arm. For the loss of an arm, three hundred and twelve weeks.

Foot. For the loss of a foot, two hundred and five weeks.

Leg. For the loss of a leg, two hundred and eighty-eight weeks.

Eye. For the loss of an eye, one hundred and twenty-eight weeks.

Loss of use. Permanent loss of the use of a hand, arm, foot, leg or eye shall be considered as the equivalent of the loss of such hand, arm, foot, leg or eye.

Amputations. Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand. Amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm. Amputation at or above the knee shall be considered as the loss of the leg.

The compensation for the foregoing specific injuries shall be in lieu of all other compensation, except the benefits provided in section thirteen of this chapter.

Other cases. In all other cases in this class of disability, the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the commission on its own motion or upon application of any party in interest.

4. Temporary partial disability. In case of temporary partial disability, except the particular cases mentioned in subdivision three of this section, an injured employee shall receive sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise during the continuance of such partial disability, but not in excess of three thousand five hundred dollars, except as otherwise provided in this chapter.

5. Limitation. The compensation payment under subdivisions one, two and four and under subdivision three except in case of the loss of a hand, arm, foot, leg or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week; the compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg or eye, shall not exceed twenty dollars per week nor be less than five dollars a week; provided, however, that if the employee's wages at the time of injury are less than five dollars per week he shall receive his full weekly wages.

6. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability. [*Subd.* 6 *am'd by L.* 1915, ch. 615.]

§ 16. Death benefits.— If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. Reasonable funeral expenses not exceeding one hundred dollars;

2. If there be a surviving wife (or dependent husband) and no child of the *deaceased under the age of eighteen years, to such wife (or dependent husband) thirty per centum of the average

* So in original.

wages of the deceased during widowhood (or dependent widowerhood) with two years' compensation in one sum, upon remarriage; and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until of the age of eighteen years; in case of the subsequent death of such surviving wife (or dependent husband) any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable until he shall reach the age of eighteen years; provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages. [*Subd.* 2 *am'd by L.* 1914, *ch.* 316.]

3. If there be surviving child or children of the deceased under the age of eighteen years, but no surviving wife (or dependent husband) then for the support of each such child until of the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.

4. If the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until of the age of eighteen years; and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the accident, fifteen per centum of such wages during such dependency. But in no case shall the aggregate

amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children.

Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident.

§ 17. Aliens.— Compensation under this chapter to aliens not residents (or about to become non-residents) of the United States or Canada, shall be the same in amount as provided for residents, except that the commission may, at its option, or upon the application of the insurance carrier, shall, commute all future installments of compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the commission.

§ 18. Notice of injury.— Notice of an injury for which compensation is payable under this chapter shall be given to the commission and to the employer within ten days after disability, and also in case of the death of the employee resulting from such injury, within thirty days after such death. Such notice may be given by any person claiming to be entitled to compensation, or by some one in his behalf. The notice shall be in writing, and contain the name and address of the employee and state in ordinary language the time, place, nature and cause of the injury, and be signed by him or by a person on his behalf or, in case of death, by any one or more of his dependents or by a person on their behalf. It shall be given to the commission by sending it by mail, by registered letter, addressed to the commission at its office. It shall

be given to the employer by delivering it to him or sending it by mail, by registered letter, addressed to the employer at his or its last known place of residence; provided that, if the employer be a partnership then such notice may be so given to any one of the partners, and if the employer be a corporation, then such notice may be given to any agent or officer thereof upon whom legal process may be served, or any agent in charge of the business in the place where the injury occurred. The failure to give such notice, unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the state fund, insurance company, or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter.

§ 19. Medical examination.— An employee injured claiming or entitled to compensation under this chapter shall, if requested by the commission, submit himself for medical examination at a time, and from time to time, at a place reasonably convenient for the employee, and as may be provided by the rules of the commission. If the employee or the insurance carrier request he shall be entitled to have a physician or physicians of his own selection to be paid by him present to participate in such examination. If an employee refuse to submit himself to examination, his right to prosecute any proceeding under this chapter shall be suspended, and no compensation shall be payable, for the period of such refusal.

§ 20. Determination of claims for compensation.— At any time after the expiration of the first fourteen days of disability on the part of an injured employee, or at any time after his death, a claim for compensation may be presented to the employer and if rejected or if within ten days after presentation, a report containing an agreement for compensation be not made and filed with the com-

mission as provided by this section, the claim may be presented to the commission. The commission shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The commission shall make or cause to be made such investigations as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the commission, together with a statement of its conclusions of fact and rulings of law. The commission may before making an award, require the claimant to appear before an arbitration committee appointed by it and consisting of one representative of employees, one representative of employers, and either a member of the commission or a person specially deputized by the commission to act as chairman, before which the evidence in regard to the claim shall be adduced and by which it shall be considered and reported upon. Immediately after such filing the commission shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law. When a claim is presented to an employer, and the employer and employee, or in case of death, his principal dependent, enter into an agreement for the payment of compensation therefor pursuant to this chapter, a joint report of such claim containing such agreement shall be made to the commission upon a form prepared by it and signed by the employer and employee, or in case of death his principal dependent. The commission shall examine such report and ap-

prove the same when the terms are strictly in accordance with this chapter and such approval shall constitute an award. However, the commission may make an award in the manner provided in this section in any case, and if the terms of the award vary from the joint report, the employer shall comply with the award. In case of unfair dealing or of bad faith on the part of the employer under this section, the commission may impose a penalty of not more than ten per centum of the award. [*As am'd by L.* 1915, *ch.* 167.]

§ 20-a. Payment of moneys in advance of award by commission.—Any employer shall upon the making of the agreement provided for in section twenty advance to any injured employee or to the principal dependent of a deceased employee, the payment or payments provided for in the agreement, in return for which he shall receive a receipt on a form supplied by the commission and signed by the person receiving the money, which receipt shall specifically state in what capacity the signer acted while so receiving such money; such receipt shall be forwarded to the commission within forty-eight hours after date of its issuance and the sum stated on its face shall be returned to said employer as provided in section twenty-five.

Prior to the making of said agreement or in the event of no agreement, any employer may at his option advance to any injured employee or to the principal dependent of a deceased employee any sum of money, in return for which he shall receive a receipt on a form supplied by the commission and signed by the person receiving the money, which receipt shall specifically state in what capacity the signer acted while so receiving such money; such receipt shall be forwarded to the commission within forty-eight hours after date of its issuance. Should any agreement or award be made the sum so stated on the face of the receipt shall be credited to the payment under the award or agreement and shall

be repaid as hereinbefore provided. Any money so advanced shall be at the employer's risk. [*Added by L.* 1915, *ch.* 168.]

§ 21. Presumptions.— In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary

1. That the claim comes within the provisions of this chapter;

2. That sufficient notice thereof was given;

3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;

4. That the injury did not result solely from the intoxication of the injured employee while on duty.

§ 22. Modification of award.— Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, the commission may at any time review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys already paid.

§ 23. Appeals from the commission.— An award or decision of the commission shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless within thirty days after a copy of such award or decision has been sent to the parties, an appeal be taken to the appellate division of the supreme court of the third department. The commission may also, in its discretion, where the claim for compensation was not made against the state fund, on the application of either party, certify to such appellate division of the supreme court, ques-

tions of law involved in its decision. Such appeals and the questions so certified shall be heard in a summary manner and shall have precedence over all other civil cases in such court. The commission shall be deemed a party to every such appeal, and the attorney-general, without extra compensation, shall represent the commission thereon. An appeal may also be taken to the court of appeals in all cases where such an appeal would lie from a decision of an appellate division, in the same manner and subject to the same limitations as is now provided in civil actions. Otherwise such appeals shall be subject to the law and practice applicable to appeals in civil actions. Upon the final determination of such an appeal, the commission shall make an award or decision in accordance therewith.

§ 24. Costs and fees.— If the commission or the court before which any proceedings for compensation or concerning an award of compensation have been brought, under this chapter, determines that such proceedings have not been so brought upon reasonable ground, it shall assess the whole cost of the proceeding upon the party who has so brought them. Claims for legal services in connection with any claim arising under this chapter, and claims for services or treatment rendered or supplies furnished pursuant to section thirteen of this chapter, shall not be enforceable unless approved by the commission. If so approved, such claim or claims shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the commission.

§ 25. Compensation, how payable.— Compensation under the provisions of this chapter shall be payable periodically by the employer, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award; but the commission may determine that any payments may be made monthly or at any other period, as it may

deem advisable. The state or insurance corporation in which an employer is insured shall, within ten days after demand by such employer and on the presentation of evidence of payment of compensation in accordance with this chapter, reimburse the employer therefor. An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall forward receipts therefor promptly to the commission. The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee or, in case of death, his dependents, provided the same shall be in the interest of justice. [*As am'd by L.* 1915, *ch.* 167.]

§ 26. Enforcement of payment in default.— If payment of compensation, or an instalment thereof, due under the terms of an award, be not made by the employer within ten days after the same is due, the insurance carrier shall be liable therefor and if not paid within ten days after demand by the injured employee or in case of death his dependents or by the commission, the amount of such payment shall constitute a liquidated claim for damages against the self-insurer or insurance corporation, which with an added penalty of fifty per centum may be recovered in an action to be instituted by the commission in the name of the people of the state. An employer who negligently or intentionally defaults in payment of compensation in the first instance under this chapter shall be liable to a penalty of not more than ten per centum of the amount of such compensation, notwithstanding the fact that the insurance corporation or state fund subsequently pays the compensation as provided in this section. If such default be made in the payment of an instalment of compensation and the whole amount of such compensation be not due, the

commission may, if the present value of such compensation be computable, declare the whole amount thereof due, and recover the amount thereof with the added penalties, as provided by this section. Any such action may be compromised by the commission or may be prosecuted to final judgment as, in the discretion of the commission, may best serve the interests of the persons entitled to receive the compenation or the benefits. Compensation recovered under this section shall be disbursed by the commission to the person entitled thereto in accordance with the award. A penalty recovered pursuant to this section shall be paid into the state treasury, and be applicable to the expenses of the commission. [*As am'd by L.* 1915, *ch.* 167.]

§ 27. Depositing future payments.— If an award under this chapter requires payment of compensation by an employer or an insurance corporation in periodical payments, and the nature of the injury makes it possible to compute the present value of all future payments with due regard for life contingencies, the commission may, in its discretion, at any time, compute and permit or require to be paid into the state fund an amount equal to the present value of all unpaid compensation for which liability exists, in trust; and thereupon such employer or insurance corporation shall be discharged from any further liability under such award and payment of the same shall be assumed by the state fund.

§ 28. Limitation of right to compensation.— The right to claim compensation under this chapter shall be forever barred unless within one year after the injury or if death result therefrom, within one year after such death, a claim for compensation thereunder shall be filed with the commission.

§ 29. Subrogation to remedies of employees.— If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents,

shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association or corporation liable to pay the same.

§ 30. Revenues or benefits from other sources not to affect compensation.— No benefits, savings or insurance of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this chapter, except that, in case of the death of an employee of the state, a municipal corporation or any other political subdivision of the state, any benefit payable under a pension system which is not sustained in whole or in part by the contributions of the employee, may be applied toward the payment of the death benefit provided by this chapter. [*Section* 30 *am'd by L.* 1914, *ch.* 316.]

§ 31. Agreement for contribution by employee void.— No agreement by an employee to pay any portion of the premium paid by his employer to the state insurance fund or to contribute to a benefit fund or department maintained by such employer or to the cost of mutual insurance or other insurance, maintained for or carried for the purpose of providing compensation as herein required, shall be valid, and any employer who makes a deduction for such purpose from the wages or salary of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor.

§ 32. Waiver agreements void.— No agreement by an employee to waive his right to compensation under this chapter shall be valid.

§ 33. Assignments; exemptions.— Claims for compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter, and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived. Compensation and benefits shall be paid only to employees or their dependents.

§ 34. Preferences.— The right of compensation granted by this chapter shall have the same preference or lien without limit of amount against the assets of the employer as is now or hereafter may be allowed by law for a claim for unpaid wages for labor.

ARTICLE 3

Security for Compensation

Section 50. Security for payment of compensation.
51. Posting of notice regarding compensation.
52. Effect of failure to secure compensation.
53. Release from all liability.
54. The insurance contract.

§ 50. Security for payment of compensation.—An employer shall secure compensation to his employees in one of the following ways:

1. By insuring and keeping insured the payment of such compensation in the state fund, or

2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association together with a copy of the contract or policy of insurance.

3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter.

If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the commission.

The commission may, in its discretion, for good cause shown, remit any such penalty, provided the employer in default secure compensation as provided in this section. [*Subd.* 3 *am'd by L.* 1914, *ch.* 316.]

§ 51. Posting of notice regarding compensation. — Every employer who has complied with section

fifty of this chapter shall post and maintain in a conspicuous place or places in and about his place or places of business typewritten or printed notices in form prescribed by the commission, stating the fact that he has complied with all the rules and regulations of the commission and that he has secured the payment of compensation to his employees and their dependents in accordance with the provisions of this chapter.

§ 52. Effect of failure to secure compensation.— Failure to secure the payment of compensation shall have the effect of enabling the injured employee or his dependents to maintain an action for damages in the courts, as prescribed by section eleven of this chapter.

§ 53. Release from all liability.— An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier.

§ 54. The insurance contract.— 1. Right of recourse to the insurance carrier. Every policy of insurance covering the liability of the employer for compensation issued by a stock company or by a mutual association authorized to transact workmen's compensation insurance in this state shall contain a provision setting forth the right of the commission to enforce in the name of the people of the state of New York for the benefit of the person entitled to the compensation insured by the policy either by filing a separate application or by making the insurance carrier a party to the original application, the liability of the insurance carrier in whole or in part for the payment of such com-

pensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance carrier shall to the extent thereof be a bar to the recovery against the other of the amount so paid.

2. Knowledge and jurisdiction of the employer extended to cover the insurance carrier. Every such policy shall contain a provision that, as between the employee and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the insurance carrier and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this chapter.

3. Insolvency of employer does not release the insurance carrier. Every such policy shall contain a provision to the effect that the insolvency or bankruptcy of the employer shall not relieve the insurance carrier from the payment of compensation for injuries or death sustained by an employee during the life of such policy.

4. Limitation of indemnity agreements. Every contract or agreement of an employer the purpose of which is to indemnify him from loss or damage on account of the injury of an employee by accidental means, or on account of the negligence of such employer or his officer, agent or servant, shall be absolutely void unless it shall also cover liability for the payment of the compensation provided for by this chapter.

5. Cancellation of insurance contracts. No contract of insurance issued by a stock company or mutual association against liability arising under

this chapter shall be cancelled within the time limited in such contract for its expiration until at least ten days after notice of intention to cancel such contract, on a date specified in such notice, shall be filed in the office of the commission and also served on the employer. Such notice shall be served on the employer by delivering it to him or by sending it by mail, by registered letter, addressed to the employer at his or its last known place of residence; provided that, if the employer be a partnership, then such notice may be so given to any one of the partners, and if the employer be a corporation then the notice may be given to any agent or officer of the corporation upon whom legal process may be served.

ARTICLE 4

State Workmen's Compensation Commission

Section 60. State workmen's compensation commission.*
61. Secretary, deputies and other employees.*
62. Salaries and expenses.
63. Office.
64. Sessions of commission.
65. Powers of individual commissioners and deputy commissioners.
66. Powers and duties of secretary.
67. Rules.
68. Technical rules of evidence or procedure not required.
69. Issue of subpoena; penalty for failure to obey.
70. Recalcitrant witnesses punishable as for contempt.
71. Fees and mileage of witnesses.

* §§ 60, 61 of the Workmen's Compensation Law were repealed, and the functions of the Workmen's Compensation Commission transferred to the newly created Industrial Commission by L. 1915, ch. 674, §§ 2-8.

Section 72. Depositions.
73. Transcript of stenographer's minutes; effect as evidence.
74. Jurisdiction of commission to be continuing.
75. Report of commission.
76. Commission to furnish blank forms.

§ 62. Expenses.— The commission may make the necessary expenditure to obtain statistical and other information to establish classifications of employments with respect to hazards and risks. The expenses of the commission, including the premiums to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers signed by at least two commissioners. [*As am'd by L.* 1915, *ch.* 674.]

§ 63. Office.— The commission shall keep and maintain its principal office in the city of Albany, in rooms in the capitol assigned by the trustees of public buildings. The office shall be supplied with necessary office furniture, supplies, books, maps, stationery, telephone connections and other necessary appliances, at the expense of the state, payable in the same manner as other expenses of the commission.

§ 64. Sessions of commission.— The commission shall be in continuous session and open for the transaction of business during all business hours of every day excepting Sundays and legal holidays. All sessions shall be open to the public and may be adjourned, upon entry thereof in its records, without further notice. Whenever convenience of parties will be promoted or delay and expense prevented, the commission may hold sessions in cities other than the city of Albany. A party may appear before such commission and be heard in person or by attorney. Every vote and official act of the commission shall be entered of record, and the records shall contain a record of each case considered, and

the award, decision or order made with respect thereto, and all voting shall be by the calling of each commissioner's name by the secretary and each vote shall be recorded as cast. A majority of the commission shall constitute a quorum. A vacancy shall not impair the right of the remaining commissioners to exercise all the powers of the full commission so long as a majority remains.

§ 65. Powers of individual commissioners and deputy commissioners.—Any investigation, inquiry or hearing which the commission is authorized to hold or undertake may be held or taken by or before any commissioner or deputy commissioner, and the award, decision or order of a commissioner or deputy commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be deemed to be the award, decision or order of the commission. Each commissioner and deputy shall, for the purposes of this chapter, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony. The commission may authorize any deputy to conduct any such investigation, inquiry or hearing, in which case he shall have the power of a commissioner in respect thereof.

§ 66. Powers and duties of secretary.—The secretary of the commission shall:

1. Maintain a full and true record of all proceedings of the commission, of all documents or papers ordered filed by the commission, of decisions or orders made by a commissioner or deputy commissioner, and of all decisions or orders made by the commission or approved and confirmed by it and ordered filed, and he shall be responsible to the commission for the safe custody and preservation of all such documents at its office;

2. Have power to administer oaths in all parts of the State, so far as the exercise of such power

is properly incident to the performance of his duty or that of the commission;

3. Designate, from time to time, with the approval of the commission, one of the clerks appointed by the commission to exercise the powers and duties of the secretary during his absence;

4. Under the direction of the commission, have general charge of its office, superintend its clerical business, and perform such other duties as the commission may prescribe.

§ 67. Rules.— The commission shall adopt reasonable rules, not inconsistent with this chapter, regulating and providing for

1. The kind and character of notices, and the service thereof, in case of accident and injury to employees;

2. The nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to compensation;

3. The forms of application for those claiming to be entitled to compensation;

4. The method of making investigations, physical examinations and inspections;

5. The time within which adjudications and awards shall be made;

6. The conduct of hearings, investigations and inquiries;

7. The giving of undertakings by all subordinates who are empowered to receive and disburse moneys, to be approved by the attorney-general as to form and by the comptroller as to sufficiency;

8. Carrying into effect the provisions of this chapter;

9. The collection, maintenance and disbursement of the state insurance fund.

§ 68. Technical rules of evidence or procedure not required.— The commission or a commissioner or deputy commissioner in making an investiga-

tion or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties.

§ 69. Issue of subpoena; penalty for failure to obey.— A subpoena shall be signed and issued by a commissioner, a deputy commissioner or by the secretary of the commission and may be served by any person of full age in the same manner as a subpoena issued out of a court of record. If a person fail, without reasonable cause, to attend in obedience to a subpoena, or to be sworn or examined or answer a question or produce a book or paper, or to subscribe and swear to his deposition after it has been correctly reduced to writing, he shall be guilty of a misdemeanor.

§ 70. Recalcitrant witnesses punishable as for contempt.— If a person in attendance before the commission or a commissioner or deputy commissioner refuses, without reasonable cause, to be examined, or to answer a legal and pertinent question or to produce a book or paper, when ordered so to do by the commission or a commissioner or deputy commissioner, the commission may apply to a justice of the supreme court upon proof by affidavit of the facts for an order returnable in not less than two nor more than five days directing such person to show cause before the justice who made the order, or any other justice of the supreme court, why he should not be committed to jail. Upon the return of such order the justice shall examine under oath such person and give him an opportunity to be heard; and if the justice determine that he has refused without reasonable cause or legal excuse to be examined or to answer a legal and pertinent question, or to produce a book or paper which he was ordered to bring, he may forth-

with, by warrant, commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

§ 71. Fees and mileage of witnesses.— Each witness who appears in obedience to a subpoena before the commission or a commissioner or deputy commissioner, or person employed by the commission to obtain the required information, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in the supreme court, which shall be audited and paid from the state treasury in the same manner as other expenses of the commission. A witness subpoenaed at the instance of a party other than the commission, a commissioner, deputy commissioner or person acting under the authority of the commission shall be entitled to fees or compensation from the state treasury, if the commission certify that his testimony was material to the matter investigated, but not otherwise.

§ 72. Depositions.— The commission may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the supreme court.

§ 73. Transcript of stenographer's minutes; effect as evidence.— A transcribed copy of the testimony, evidence and procedure or of a specific part thereof, or of the testimony of a particular witness or of a specific part thereof, on any investigation, by a stenographer appointed by the commission, being certified by such stenographer to be a true and correct transcript thereof and to have been carefully compared by him with his original notes, may be received in evidence by the commission with the same effect as if such stenographer were present and testified to the facts so certified, and a copy of such transcript shall be furnished on demand to any party upon payment of the fee pro-

vided for a transcript of similar minutes in the supreme court.

§ 74. Jurisdiction of commission to be continuing.— The power and jurisdiction of the commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just.

§ 75. Report of commission.-- Annually on or before the first day of February, the commission shall make a report to the legislature, which shall include a statement of the number of awards made by it and the causes of the accidents leading to the injuries for which the awards were made, a detailed statement of the expenses of the commission, the condition of the state insurance fund, together with any other matter which the commission deems proper to report to the legislature, including any recommendations it may desire to make.

§ 76. Commission to furnish blank forms.—The commission shall prepare and cause to be distributed so that the same may be readily available blank forms of application for compensation, notice to employers, proofs of injury or death, of medical or other attendance or treatment, of employment and wage earnings, and for such other purposes as may be required. Insured employers shall constantly keep on hand a sufficient supply of such blanks.

ARTICLE 5

State Insurance Fund

Section 90. Creation of state fund.
91. State treasurer custodian of fund.
92. Surplus and reserve.
93. Investment of surplus or reserve.
94. Administration expense.
95. Classification of risks and adjustment of premiums.
96. Associations for accident prevention.

Section 97. Requirements in classifying employment and fixing and adjusting premium rates.
98. Time of payment of premiums.
99. Action for collection in case of default.
100. Withdrawal from fund.
101. Audit of payrolls.
102. Falsification of payroll.
103. Wilful misrepresentation.
104. Inspections.
105. Disclosures prohibited.

§ 90. Creation of state fund.— There is hereby created a fund to be known as "the state insurance fund," for the purpose of insuring employers against liability under this chapter and of assuring to the persons entitled thereto the compensation provided by this chapter. Such fund shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided. Such fund shall be administered by the commission without liability on the part of the state beyond the amount of such fund. Such fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of expenses in the manner provided in this chapter.

§ 91. State treasurer custodian of fund.— The state treasurer shall be the custodian of the state insurance fund; and all disbursements therefrom shall be paid by him upon vouchers authorized by the commission and signed by any two members thereof. The state treasurer shall give a separate and additional bond in an amount to be fixed by the governor and with sureties approved by the state comptroller conditioned for the faithful performance of his duty as custodian of the state fund. The state treasurer may deposit any portion of the

state fund not needed for immediate use, in the manner and subject to all the provisions of law respecting the deposit of other state funds by him. Interest earned by such portion of the state insurance fund deposited by the state treasurer shall be collected by him and placed to the credit of the fund.

§ 92. Surplus and reserve.— Ten per centum of the premiums collected from employers insured in the fund shall be set aside by the commission for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars, and thereafter five per centum of such premiums, until such time as in the judgment of the commission such surplus shall be sufficiently large to cover the catastrophe hazard. The commission shall also set up and maintain a reserve adequate to meet anticipated losses and carry all claims and policies to maturity.

§ 93. Investment of surplus or reserve.— The commission may, pursuant to a resolution of the commission approved by the comptroller, invest any of the surplus or reserve funds belonging to the state insurance fund in the same securities and investments authorized for investment by savings banks. All such securities or evidences of indebtedness shall be placed in the hands of the state treasurer who shall be the custodian thereof. He shall collect the principal and interest thereof, when due, and pay the same into the state insurance fund. The state treasurer shall pay all vouchers drawn on the state insurance fund for the making of such investments when signed by two members of the commission, upon delivery of such securities or evidences of indebtedness to him, when there is attached to such vouchers a certified copy of the resolution of the commission authorizing the investment. The commission may, upon like resolution approved by the comptroller, sell any of such securities.

§ 94. Administration expense.— The entire expense of administering the state insurance fund shall be paid in the first instance by the state, out of moneys appropriated therefor. In the month of January, nineteen hundred and eighteen, and annually thereafter in such month, the commission shall ascertain the just amount incurred by the commission during the preceding calendar year, in the administration of the state insurance fund exclusive of the expense for the examination, determination and payment of claims, and shall refund such amount to the state treasury. If there be employees of the commission other than the commissioners themselves and the secretary whose time is devoted partly to the general work of the commission and partly to the work of the state insurance fund, and in case there is other expense which is incurred jointly on behalf of the general work of the commission and the state insurance fund, an equitable apportionment of the expense shall be made for such purpose and the part thereof which is applicable to the state insurance fund shall be chargeable thereto. As soon as practicable after December thirty-one, nineteen hundred and seventeen, and annually thereafter, the commission shall calculate the total administrative expense incurred during the preceding calendar year in connection with the examination, determination and payment of claims and the percentage which this expense bore to the total compensation payments made during that year. The percentage so calculated and determined shall be assessed against the insurance carriers including the state fund as an addition to the payments required from them in the settlement of claims during the year immediately following, and the amounts so secured shall be transferred to the state treasury to reimburse it for this portion of the expense of administering this chapter.

§ 95. Classification of risks and adjustment of premiums.— Employments coming under the provisions of this chapter shall be divided for the purposes of the state fund, into the groups set forth in section two of this chapter. Separate accounts shall be kept of the amounts collected and expended in respect to each such group for convenience in determining equitable rates; but for the purpose of paying compensation the state fund shall be deemed one and indivisible. The commission shall have power to rearrange any of the groups set forth in section two by withdrawing any employment embraced in it and transferring it wholly or in part to any other group, and from such employments to set up new groups at its discretion. The commission shall determine the hazards of the different classes composing each group and fix the rates of premiums therefor based upon the total payroll and number of employees in each of such classes of employment at the lowest possible rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual risk.

§ 96. Associations for accident prevention.— The employers in any of the groups described in section two or established by the commission may with the approval of the commission form themselves into an association for accident prevention, and may make rules for that purpose. If the commission is of the opinion that an association so formed sufficiently represents the employers in such group, it may approve such rules, and when so approved and approved by the industrial board of the labor department they shall be binding on all employers in such group. If such an approved association appoint an inspector or expert for the purpose of accident prevention, the commission

may at its discretion provide in whole or in part for the payment of the remuneration and expenses of such inspector or expert, such payment to be charged in the accounting to such group. Every such approved association may make recommendations to the commission concerning the fixing of premiums for classes of hazards, and for individual risks within such group.

§ 97. Requirements in classifying employment and fixing and adjusting premium rates.— The following requirements shall be observed in classifying employments and fixing and adjusting premium rates:

1. The commission shall keep an accurate account of the money paid in premiums by each of the several classes of employments or industries, and the disbursements on account of injuries and death of employees thereof, including the setting up of reserves adequate to meet anticipated losses and to carry the claims to maturity, and also, on account of the money received from each individual employer and the amount disbursed from the state insurance fund on account of injuries and death of the employees of such employer, including the reserves so set up;

2. On January first, nineteen hundred and fifteen, and every fifth year thereafter, and at such other times as the commission, in its discretion, may determine, a readjustment of the rate shall be made for each of the several groups of employment or industries and of each hazard class therein, which, in the judgment of the commission, shall have developed an average loss ratio, in accordance with the experience of the commission in the administration of the law as shown by the accounts kept as provided herein;

3. If any such accounting show an aggregate balance (deemed by the commission to be safely and properly divisible) remaining to the credit of

any class of employment or industry, after the amount required shall have been credited to the surplus and reserve funds and after the payment of all awards for injury or death lawfully chargeable against the same, the commission may in its discretion credit to each individual member of such group, who shall have been a subscriber to the state insurance fund for a period of six months or more prior to the time of such readjustment, and whose premium or premiums exceed the amount of the disbursements from the fund on account of injuries or death of his employees during such period, on the instalment or instalments of premiums next due from him such proportion of such balance as the amount of his prior paid premiums sustains to the whole amount of such premiums paid by the group to which he belongs since the last readjustment of rates;

4. If the amount of premiums collected from any employer at the beginning of any period of six months is ascertained and calculated by using the estimated expenditure of wages for the period of time covered by such premium payment as a basis, an adjustment of the amount of such premium shall be made at the end of such six months, and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages for such period; and, if such wage expenditure for such period is less than the amount on which such estimated premium was collected, such employer shall be entitled to receive a refund from the state insurance fund of the difference between the amount so paid by him and the amount so found to be actually due, or to have the amount of such difference credited on succeeding premium payments, at his option; and if such actual premium, when so ascertained, exceeds in amount a premium so paid by such employer at the beginning of such six months, such employer shall immediately upon being advised of the true amount

of such premium due forthwith pay to the treasurer of the state an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of such six months' period.

§ 98. Time of payment of premiums.— Except as otherwise provided in this chapter, all premiums shall be paid by every employer into the state insurance fund on or before July first, nineteen hundred and fourteen, and semi-annually thereafter, or at such other time or times as may be prescribed by the commission. The commission shall mail a receipt for the same to the employer and place the same to the credit of the state insurance fund in the custody of the state treasurer.

§ 99. Action for collection in case of default.— If an employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him shall be collected by civil action against him in the name of the people of the state of New York, and it shall be the duty of the commission on the first Monday of each month after July first, nineteen hundred and fourteen, to certify to the attorney-general of the state the names and residences, or places of business, of all employers known to the commission to be in default for such payment or payments for a longer period than five days and the amount due from such employer, and it shall then be the duty of the attorney-general forthwith to bring or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due, and the same when collected, shall be paid into the state insurance fund, and such employer's compliance with the provisions of this chapter requiring payments to be made to the state insurance fund shall date from the time of the payment of said money so collected as aforesaid to the state treasurer for credit to the state insurance fund.

§ 100. Withdrawal from fund.— Any employer may, upon complying with subdivision two or three of section fifty of this chapter, withdraw from the fund by turning in his insurance contract for cancellation, provided he is not in arrears for premiums due the fund and has given to the commission written notice of his intention to withdraw within thirty days before the expiration of the period for which he has elected to insure in the fund; provided that in case any employer so withdraws, his liability to assessments shall, notwithstanding such withdrawal, continue for one year after date of such withdrawal as against all liabilities for such compensation accruing prior to such withdrawal.

§ 101. Audit of payrolls.— Every employer who is insured in the state insurance fund shall keep a true and accurate record of the number of his employees and the wages paid by him, and shall furnish to the commission, upon demand, a sworn statement of the same. Such record shall be open to inspection at any time and as often as the commission shall require to verify the number of employees and the amount of the payroll.

§ 102. Falsification of payroll.— An employer who shall wilfully misrepresent the amount of the payroll upon which the premiums chargeable by the state insurance fund is to be based shall be liable to the state in ten times the amount of the difference between the premiums paid and the amount the employer should have paid had his payroll been correctly computed and the liability to the state under this section shall be enforced in a civil action in the name of the state insurance fund, and any amount so collected shall become a part of such fund.

§ 103. Wilful misrepresentation.— Any person who wilfully misrepresents any fact in order to obtain insurance in the state insurance fund at less than the proper rate for such insurance, or in order

to obtain payment out of such fund, shall be guilty of a misdemeanor.

§ 104. Inspections.— The commission shall have the right to inspect the plants and establishments of employers insured in the state insurance fund; and the inspectors designated by the commission shall have free access to such premises during regular working hours.

§ 105. Disclosures prohibited.— Information acquired by the commission or its officers or employees from employers or employees pursuant to this chapter shall not be opened to public inspection, and any officer or employee of the commission who, without authority of the commission or pursuant to its rules or as otherwise required by law shall disclose the same shall be guilty of a misdemeanor.

ARTICLE 6

Miscellaneous Provisions

Section 110. Penalties applicable to expense of commission.
111. Record and report of injuries by employers.
112. Information to be furnished by employer.
113. Inspection of records of employers.
114. Interstate commerce.
115. Penalties for false representations.
116. Limitation of time.
117. Duties of commissioner of labor.
118. Unconstitutional provisions.
119. Actions or causes of action pending.

§ 110. Penalties applicable to expenses of commission.— All penalties imposed by this chapter shall be applicable to the expenses of the commission. When collected by the commission such penalties shall be paid into the state treasury and be thereafter appropriated by the legislature for the purposes prescribed by this section.

§ 111. Record and report of injuries by employers.— Every employer shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within ten days after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing by the employer to the commission upon blanks to be procured from the commission for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address and occupation of the injured employee, the time, nature and cause of the injury and such other information as may be required by the commission. An employer who refuses or neglects to make a report as required by this section shall be guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars.

§ 112. Information to be furnished by employer.— Every employer shall furnish the commission, upon request, any information required by it to carry out the provisions of this chapter. The commission, a commissioner, deputy commissioner, or any person deputized by the commission for that purpose, may examine under oath any employer, officer, agent or employee. An employer or an employee receiving from the commission a blank with directions to file the same shall cause the same to be properly filled out so as to answer fully and correctly all questions therein, or if unable to do so, shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the commission within the period fixed by the commission therefor.

§ 113. Inspection of records of employers.—All books, records and payrolls of the employers showing or reflecting in any way upon the amount of wage expenditures of such employers shall always be open for inspection by the commission or any of its authorized auditors, accountants or inspec-

tors for the purpose of ascertaining the correctness of the wage expenditure and number of men employed and such other information as may be necessary for the uses and purposes of the commission in the administration of this chapter.

§ 114. Interstate commerce.— The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees.

§ 115. Penalties for false representation.— If for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for himself or any other person, any person wilfully makes a false statement or representation, he shall be guilty of a misdemeanor.

§ 116. Limitation of time.— No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian or next friend.

§ 117. Duties of commissioner of labor.— The commissioner of labor shall render to the commission any proper aid and assistance by the department of labor as in his judgment does not interfere with the proper conduct of such department.

§ 118. Unconstitutional provisions.— If any section or provision of this chapter be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the chapter as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

§ 119. Actions or causes of action pending.— This act shall not affect any action pending or cause of action existing or which accrued prior to July first, nineteen hundred and fourteen.

ARTICLE 7

Laws Repealed; When to Take Effect

Section 130. Laws repealed.
131. When to take effect.

§ 130. Laws repealed.— Article fourteen-a and sections two hundred and fifteen to two hundred and nineteen-g, both inclusive, of chapter thirty-six of the laws of nineteen hundred and nine, as amended by chapter six hundred and seventy-four of the laws of nineteen hundred and ten, are hereby repealed.

§ 131. When to take effect.— This chapter shall take effect immediately, provided that the application of this chapter as between employers and employees and the payment of compensation for injuries, to employees or their dependents, in case of death, shall take effect July first, nineteen hundred and fourteen, but payments into the state insurance fund may be made prior to July first, nineteen hundred and fourteen.

§ 2. This act shall take effect immediately, except as provided in section one hundred and thirty-one as re-enacted hereby.

APPENDIX "B."

Provisions of the Constitution of the State of New York.

Article I, § 2. Trial by jury.—"The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

Article I, § 19. Workmen's compensation.—"Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

Adopted by the people November 4, 1913; in effect January 1, 1914.

APPENDIX "C."

According to a schedule and chart, set forth at pp. 8-10 of Bulletin No. 7 (whole number 185) of the Bureau of Labor Statistics in the Federal Department of Labor, issued October, 1915, workmen's compensation or insurance laws, as enacted by thirty-one of the several states and territories, may be classified as follows:

Compensation, Elective.

Alaska.
Colorado.
Connecticut.
Illinois.
Indiana.
Iowa.
Kansas.
Louisiana.
Maine.
Michigan.
Minnesota.
Montana.
Nebraska.
New Hampshire.
New Jersey.
Pennsylvania.
Rhode Island.
Vermont.
Wisconsin.

Compensation, Compulsory.

Arizona.
California.
Maryland.
New York.
Oklahoma.

Insurance, Elective.

Massachusetts.
Nevada.
Oregon.
Texas.
West Virginia.

Insurance, Compulsory.

Ohio. Washington. Wyoming.

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SUPPLEMENTAL BRIEF
OF
PLAINTIFF-IN-ERROR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1916

No. 320.

THE NEW YORK CENTRAL RAILROAD COMPANY,
PLAINTIFF-IN-ERROR.

vs.

SARAH WHITE,
DEFENDANT-IN-ERROR,

In Error to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York.

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Supplemental Brief for Plaintiff-in-Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 320.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-Error,
against
SARAH WHITE,
Defendant-in-Error.

Decisions Since the Former Argument.

The weight to be accorded to two cases cited upon the main brief for the plaintiff in error has been affected by two decisions rendered since the former argument of this cause:

1. The conclusion reached by the Supreme Court of Kansas in Barker v. K. C. M. & O. Ry. Co. (43 L. R. A. [N. S.], 1121), cited at page 10 of our main brief, cannot be reconciled with the decision of this court in Chicago, Burlington & Quincy R. R. v. Harrington (241 U. S., 177), decided May 1, 1916. Therefore, the Barker case will not be pressed further upon the court's attention.

2. The decision of the Texas Court of Civil Appeals in Middleton v. Texas Power and Light Company (178 S. W., 956), cited at length at pages 27-30 of our main brief, was reversed on April 26, 1916, by the Supreme Court of Texas, whose opinion is reported in 185 Southwestern, 556. Of the later decision, however, it is to be said that the Supreme Court of Texas held that, although there was an election vouchsafed to the

employer under the Texas Act, there need be no election secured to the employee, because of complete power in the legislature (a) to abolish as to the employee his remedy in tort; (b) to change the defenses against the application of that remedy; (c) and to substitute other rights for those which the employee had had at common law. But to the theory which controlled its disposition of the Middleton case, the Supreme Court of Texas did not attempt to meet the complete answer, which is that the Texas legislature did not, by the Compensation Act under review, abolish tort, nor did it fix for employees a remedy by way of substitute. Hence, we cannot regard the reasoning of the intermediate appellate court as in any wise impaired because of the result in the Supreme Court of Texas.

The Interstate Character of White's Work.

Point 1, subdivision 1, of our main brief (pp. 8-10), deals with the question whether White was so employed by the railroad in interstate commerce as to be subject to the Federal Employers' Liability Act. Since the former argument decisions of this court have given further light upon classification of employment as within or outside of the Federal Employers' Liability Act.

In C. B. & Q. R. R. v. Harrington (241 U. S., 177, 180) this court declared:

> "The Federal Act speaks of interstate commerce in a practical sense suited to the occasion."

And in Erie R. R. Co. v. Welsh, decided by this court December 18, 1916, where the issue was whether the employee, a yard brakeman, came under the Federal Act, it was said upon the authority

of the *Carr* and the *Shanks* cases: "The question remains whether he was performing an act so directly and immediately connected with his previous act of placing the interstate car in the 'F. D. yard' as to be a part of it or a necessary incident thereto. * * * And this depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and indivisible task."

In connection with this court's warning against hasty generalization from particular cases must also be remembered the rule, which this court has enunciated and repeated with emphasis, that those employees are included within the Federal Act who are "engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

Shanks v. D. L. & W., 239 U. S., 556, 558.

To a correct understanding and proper application of this rule in the cases as they arise, it is esential to bear in mind the significant expression which this court in Pedersen v. D. L. & W. R. R. (229 U. S., 146, 152) employed when it characterized Pedersen's act in carrying the bolts for repair of the bridge as "a minor task which was essentially a part of the larger one."

So, also, we must heed this court's caution that too much regard must not be paid to "the physical position of the employee at the moment of injury," *i. e.*, to the minor task in which he was engaged, and accordingly this court held, in substance, that the work of cutting out intrastate cars, incidental to the operation of an interstate train, was a minor task which was essentially a part of the larger one.

N. Y. C. R. R. v. Carr, 238 U. S., 260, 263.

To determine, then, the classification of employment, whether within or outside of interstate commerce, the nature of the employee's task, not too broadly or too narrowly conceived, must be the test. Indeed, not until a definition be formulated can it be asserted that a given task is "a part" or "essentially a part" of interstate commerce.

Various *units of work* are necessary to the *normal development* of interstate commerce, and to the completion of those units of work sundry minor tasks are essential. Plainly the particular unit of work involved in a given case must determine the color, Federal or State, of an employee's occupation at the time of injury. Thus in *Pedersen's* case the building of the bridge was the unit of work which gave Federal color to his occupation; while in the *Harrington* case, "the removal of the coal from the storage tracks to the coal pocket, or chutes" (p. 180), was what gave State color to his employment.

If a part of a railroad's roadbed were undergoing a change of grade by considerable elevation immediately over, or by considerable depression immediately beneath, the existing original grade on which, pending completion of the replacement, interstate trains continue to run, would not an employee injured while employed upon the new grade, whether above or below the grade yet in use, be occupied in a unit of work essential to the normal development of the railroad's facilities for interstate transportation?

Again, we may have the case of a double-track interstate railroad, which is in process of expansion to a four-track roadbed, *within the original right of way*, by the laying of one additional track at one side, and the other additional track at the other side, of the original double tracks. To carry the increased weight incident to the operation of

four tracks, where previously there had been but two, it may very well be necessary to reinforce, by steel and concrete construction, the support beneath not only the two additional tracks, but also beneath the two original tracks. In such a case the unit of work is directed to the normal development of an interstate railroad and such unit of work, since it is not only designed for the furtherance of interstate commerce, but is actually utilized for interstate transportation during the progress of the improvement, will give interstate color to all employment connected therewith. Else, we should have the incongruity that the task of a man, engaged all day in tossing rivets to riveters on the steel construction beneath the four tracks, must be classified as Federal or State accordingly as he may toss a rivet to a rivet worker beneath the original, or beneath the additional, tracks.

Now, White's task at which he was killed was that of a watchman upon the site of a track realignment. The "physical position" of White at the instant when he met his death is, as the *Carr* case indicates, too narrow a consideration to be controlling; otherwise the nature of his work would be made to depend upon inconclusive *minutiae*, which might readily lead to an incorrect result. Hence, White's physical activity at the moment cannot be regarded, considered alone, as decisive; still less the particular object which he as a watchman was watching, or whether he was then watching anything at all. The inconsequential result of applying so narrow a test appears in *Chicago, Rock Island & Pacific Ry. Co.* v. *Industrial Board of Illinois* (113 N. E., 80), decided June 22, 1916. In that case a yard watchman, in a yard containing cars of interstate freight, had stepped from a moving train and was immediately killed by another train pass-

ing in the opposite direction on an adjacent track. In considering whether the case was one for compensation under the State law or for suit in tort under the Federal Act, the Supreme Court of Illinois regarded as decisive the consideration of just what the watchman was watching or inspecting at the moment, and therefore affirmed a judgment for compensation with the remark that a different question would have been presented on a showing that at the time of the accident the watchman "was actually inspecting cars containing interstate freight, or that cars containing such freight were at the moment within the line of his vision." (P. 82.)

The larger task on which White was engaged was track realignment, work of maintenance of the interstate highway, a task properly colorable as interstate employment, since it was within the same considerations which were decisive of Pedersen's classification. His task was an essential, though inconspicuous, part of a unit of work necessarily performed in the normal development of the railroad as an instrumentality of interstate commerce.

Significant in considering the color of White's work is the fact that his death was due to direct exposure to the train hazard of an interstate highway. White, it will be remembered, was struck by a train close by his work and on an operating interstate highway. The opinion of the Workmen's Compensation Commission asserts (transcript, p. 38):

> "The injury happened in the course of his employment and upon the premises of his employer * * * and was incidental to his employment. It had relation to his work and was a risk in the regular line of his duties."

To such fact reference is made here not as decisive, but as indicative of the nature of White's work, viz., a minor task, which was essentially part of the larger unit of track realignment of an interstate railroad in actual operation.

Cases which the courts have classified as outside of interstate commerce, because involving work of new construction, such as the construction of new cut-off lines where the work may be miles from the operation of the main line, are distinguishable from the case at bar. Examples of such cases are those of *Jackson* and of *Bravis*, cited at page 8 of our main brief; also, *Raymond* v. *C. M. & St. P. Ry. Co.* (233 Fed., 239). Work such as was involved in those cases cannot be regarded as "closely connected" with or "closely related" to interstate transportation. Rather must it be classified as outside of interstate commerce because of its character as new construction, definitely separated in space and in purpose from the actual operation of an existing interstate highway.

In *Chicago & Erie R. R.* v. *Steele* (108 N. E., 4), decided by the Supreme Court of Indiana in March, 1915, the railroad "was constructing * * * another track for its railroad, so that, when completed, it might have a double, instead of a single, track railway." Steele "was one of a train crew employed on a work train engaged in hauling railroad ties for distribution along the right of way, which ties were intended to be used on the grade of the proposed second track. The grade was not then finished. The work train moved along the rails of the existing track, which was then used in interstate commerce, and the ties were thrown to the side along the line of the new grade. The operation of the work train was wholly in this State, and no part of the proposed track had been used for any purpose, but when the same

might have been completed it was intended by appellant to use the same in interstate commerce."

After referring to the question which, as pointed out at page 8 of our main brief, this court left open in the *Pedersen* case, the court held Steele to be outside the provisions of the Federal Employers' Liability Act, and *Illinois Central R. R.* v. *Behrens* (233 U. S., 473) was cited to bear out the suggestion of the Supreme Court of Indiana that the double track might never have been completed so as to be used in any kind of commerce. But the point actually decided in the *Behrens* case was that a fireman employed by an interstate railway carrier on a switch-engine, who was killed while aiding in the work of moving several cars all loaded with intrastate freight between two points in the same city, was not employed in interstate commerce. In that case, the express and definite color, by the only evidence, was intrastate. It is inconclusive that Steele was engaged in construction, and not in train operation. Both construction and maintenance have been included or excluded by considering the purpose of the unit of work to which the work of the injured employee belonged. In the construction of double track for the normal development of an interstate railroad the unit of work is the great unit of the maintenance of the interstate highway for the passage of commerce, and the task of the individual employee engaged in the double tracking is a part of that larger unit, and should be given interstate color.

Properly conceived, the unit of work decisive of White's employment was realignment of an interstate highway, because White was killed on duty by the operating hazard of such a highway. His work was an incident of the familiar activity of the normal growth of a railroad. It can only be regarded as new construction in the sense that, as

a result of such realignment and corrections of grade and reballasting and substitution of rail, the reconstruction or replacement of bridges, a new highway may be gradually evolved suited to the requirements of the normal growth of interstate commerce. White was, therefore, it is urged, employed in interstate commerce at the time of his death and this case comes within the exclusive jurisdiction of the Federal Act.

All of which is respectfully submitted.

Dated, January 22, 1917.

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IN THE

Supreme Court of the United States

NEW YORK CENTRAL RAILROAD COMPANY,

Plaintiff in error,

vs.

SARAH WHITE

October Term, 1915.

No. [redacted] 32

In error to the Supreme Court, Appellate Division, Third Judicial Department of the State of New York

Brief of the New York State Industrial Commission

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Supreme Court of the United States.

NEW YORK CENTRAL RAILROAD COMPANY, *Plaintiff-in-Error,* *against* SARAH WHITE.	October Term, 1915.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK

BRIEF OF THE NEW YORK STATE INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

This is a writ of error to review a judgment of the Court of Appeals of the State of New York which affirmed an award of the Appellate Division of the Supreme Court, which in turn affirmed an award of the Workmen's Compensation Commission of New York which awarded compensation to Sarah White at the rate of $3.03 per week, because of the death of her husband, Jacob White, which was due to accidental injuries received by him on September 2, 1914, while in the employ of the plaintiff-in-error.

The railroad company at the time of the accident was constructing a new station at White Plains and was laying new main tracks. This new construction work was to the west of the old main tracks. The railroad station was to the east. The deceased, Jacob White, was employed as a night watchman in relation to this new construction work. His duties required him to watch out for fires and trespassers and perform in general such work as might be necessary to protect the property, materials and tools used and owned by the railroad company for this new construction work. On the night of the accident White reported for duty at 6:30 p. m., and received instructions from a fellow workman. These instructions were delivered to the deceased at a point east of the old main track and after receiving such instructions he proceeded westerly toward the new construction work. Within a minute or two after receiving his instructions he was found dead on the southbound track, having been struck by a southbound train (transcript, pp. 16, 17). There were two old main line tracks and at the time or immediately prior to the time of the accident there was a passenger train at or near the station upon each of these tracks (p. 25). The deceased had received special instructions upon this occasion to look out for thieves who were supposed to be in the neighborhood (p. 17). Outside of any orders, deceased was to use his own judgment as to how to perform the work (p. 14).

The argument upon the constitutional questions with reference to the Workmen's Compensation Law of New York has been set forth in the brief in the case of Southern Pacific Company, plain-

tiff-in-error v. Marie Jensen, argued herewith, and will not be repeated. The argument that the Workmen's Compensation Law applies to interstate employees where there is no negligence has been set forth in the case of New York Central Railroad Company, plaintiff-in-error v. James Winfield, and will not be repeated. It is, however, contended in this case that the deceased workman was not engaged in interstate work. The Workmen's Compensation Commission has found that "the deceased was not engaged in interstate commerce" (p. 31). This finding is borne out by the evidence and we think also by the law.

In the case of Pederson v. D., L. & W. R. R. Co., 229 U. S. 146, in holding that the Federal act applies to an employee repairing a bridge in actual use, the United States Supreme Court said:

> "Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities of interstate commerce but only with the work of maintaining them in proper condition after they have become instrumentalities and during their use as such." (p. 152.)

In the case of Bravis v. C. M. & St. P. R. R. Co., 217 Fed. Rep. 234, the injured workman was engaged in the construction of a new bridge on a cut-off. Neither the bridge nor the cut-off had as yet been in use by the railroad company and it was held that an action could not be maintained under the Federal act.

In the case of Jackson v. C. M. & St. P. R. R. Co., 210 Fed. Rep. 495, the plaintiff was injured while building a tunnel which was to be used in

the transportation of interstate commerce. The court held that the case did not come within the Federal Employer's Liability Act because the tunnel had not been used in interstate commerce.

The same principle was applied in the case of Thomas v. B. & M. R. R. Co., 218 Fed. Rep. 143, in which the plaintiff was injured while engaged in tearing down a roundhouse which had been rendered useless and had ceased to exist as an instrumentality in interstate commerce.

In the case of Ill. Central R. R. Co. v. Behrens, 233 U. S. 476, a crew was attached to a switch engine operated exclusively in the city of New Orleans. The plaintiff's intestate was a fireman and came to his death while at his post of duty through a head-on collision. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several cars for various destinations within and without the state. The court in holding that the deceased was not engaged in interstate commerce says:

> "Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. * * *
>
> "Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within

the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

Respectfully submitted,

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